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A SELECTION OF

LEADING CASES

ILLUSTRATING THE

CRIMINAL LAW

BY

A. M. WILSHERE, M.A., LL.B.,
of Gray's Inn, Barrister-at-Law.

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PREFACE.

In this edition the number of cases has been considerably increased and it is hoped that it will now form a useful supplement to any of the standard textbooks on Criminal Law. I have adhered to the general plan of not dealing with evidence, which is so comprehensively dealt with in the late Mr. S. E. Cockle's "Leading Cases on Evidence," but I have included a few recent cases of importance, most of which are of later date than the last edition of his book.

A. M. W.

1 Elm Court, Temple.
July, 1924.

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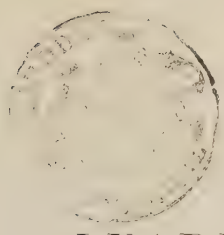
ERRATA.

P. 146. Case 73. *For* "Grubbs" *read* "Grubb."

P. 239. Case 141. *Oakey* v. *Jackson.* This case should not have been included among the cases on homicide, but should have been placed between cases 150 and 151.



LEADING CASES

IN

CRIMINAL LAW

1.

CATTELL v. IRESON.

(1858) E. B. & E. 97.

By s. 23 of the Game Act, 1831, it was provided that any person using any instrument or engine for the purpose of taking game, not being authorized by certificate, should be liable to a fine of £5 for every such offence. By s. 38, in default of payment of a fine the person convicted may be imprisoned. *Held*, that an information under the statute was a criminal proceeding in which the offender was charged with the commission of an offence punishable on summary conviction.

Lord Campbell, C.J.—**It is our business not to estimate the degree of moral guilt involved in the act . . . but to see how such act is treated by the Legislature. . . .** I see that the Legislature has . . . made the act a crime, **punishable** by fine or imprisonment. It is not like the case of . . . a fiscal proceeding, nor like a proceeding for a civil right, nor like a proceeding before a magistrate for a wrong done to the party applying. . . . That being so, was not this proceeding instituted for an act punishable on summary conviction, to punish a person who had violated the statute and was punishable for that? I cannot be bound by any opinion I may form of the morality of that act; but I must see what it is that the Legislature has chosen to punish. Now I am clearly of opinion that that which s. 23 forbids is treated by the Legislature as

a crime; and **the enactment has in view the punishment of the offender.**

CROMPTON, J.—It seems to me that this is clearly an offence **punishable by a summary proceeding** under the Act **and of a criminal nature.** The first circumstance which I remark is that the act is punishable by a fine according to the magnitude of the offence, and if the fine is not paid the punishment falls upon the person, to an extent, I presume, equivalent to a fine. My brother Hayes (*a*) says that the imprisonment is only by way of punishment for the failure to pay. I think that is not so, but that the effect of the enactment is that, if the party convicted cannot pay, an imprisonment is to be awarded adequate to the offence.

2.

THE ATT.-GEN. v. BRADLAUGH.

(1885) 14 Q. B. D. 667.

By s. 5 of the Parliamentary Oaths Act, 1866, it was provided that any member of the House of Commons voting as such in the House without having made and subscribed the oath appointed by the Act should for every offence be liable to a penalty of £500, to be recovered by action in one of Her Majesty's Superior Courts at Westminster. *Held,* that an information by the Attorney-General to recover penalties under this Act was a civil proceeding.

BRETT, M.R.—Wherever an Act of Parliament imposes a new obligation, and in the same Act imposes a consequence upon the non-fulfilment of that obligation, that is the only consequence. Therefore it seems to me that the only consequence of voting as a member without having taken the oath in the manner appointed is, that the member becomes liable to a penalty. If that be so, no indictment will lie, and, as far as my judgment goes, nothing in the nature of a criminal proceeding can be taken upon this statute. **The recovery of a penalty, if that is the only consequence, does not make the**

(*a*) *I.e.*, Serjeant Hayes, for the defendant. A serjeant-at-law was addressed in Court by the Judges as "Brother."

prohibited act a crime. If it did, it seems to me that that distinction which has been well known and established in law for many years between a penal statute and a criminal enactment, would fall to the ground, for every penal statute would involve a crime, and would be a criminal enactment. In construing this Act of Parliament I should on that ground alone say that no crime is enacted by this Act. But there is more than that: this penalty of £500 is . . . to be recovered "by action in one of Her Majesty's Superior Courts at Westminster" . . . and when the Legislature is found using the words "by action," that word construed according to its ordinary meaning does not seem to me to include an indictment or a criminal information. But there is more than that. The words are "by action in one of Her Majesty's Superior Courts at Westminster." Now a criminal information never was moved except in the Court of Queen's Bench. An information by the Attorney-General also was moved in the Court of Exchequer, but that was a procedure for the purpose of recovering a debt, or for the purpose of rectifying a trespass, or for the purpose of dealing with some injury to the Crown in its particular capacity, and not merely as the representative of the public. So that this argument seems to me to show that by the use of the words "by action," and by the still stronger language "in one of Her Majesty's Superior Courts" (which means in any one of Her Majesty's Superior Courts) at Westminster, this offence cannot be the subject-matter of criminal information and cannot be the subject of indictment, and that the only proceeding which can be brought upon the statute . . . is an information filed by the authority of the Attorney-General, and in his name, such as was formerly brought generally on the revenue side of the Court of Exchequer.

Now comes the question whether an information by the Attorney-General on the revenue side of the Court of Exchequer is or is not a criminal proceeding in any sense. In order to answer this question we must consider *Att.-Gen.* v. *Radloff* (*a*). . . . It is a case in which the judges were equally

(*a*) 10 Ex. 84.

divided in opinion. . . . Two of the judges were of opinion that unless there was something very peculiar in the Act of Parliament, such as that it in terms enacted that it was to be a criminal matter, the proceeding on the revenue side of the Court of Exchequer for the recovery of a penalty in the name of the Attorney-General was not a criminal proceeding. The other two were of opinion that it was. . . .

Not very long after *Att.-Gen.* v. *Radloff* had been heard in the Court of Exchequer, the Legislature passed an Act of Parliament, which certainly, to my mind, seems to have decided the controversy in favour of those judges who considered that a suit or information for penalties on the revenue side of the Court of Exchequer was not a criminal proceeding, because the Legislature applied to such trials rules which are applicable to a civil trial, and which are not applicable to a criminal trial. . . .

Then it was said that the Law Lords, in the case of *Bradlaugh* v. *Clarke* (*b*), have said that the offence is a crime. My own impression of that judgment in the House of Lords is that the learned Lords did not consider that this was a crime. . . . The Law Lords came to the conclusion that the information on the revenue side of the Court of Exchequer could not under the Act be brought by a common informer, but could only be brought before the Court by the Attorney-General; it follows from their judgment that it is only the Attorney-General who can institute a proceeding to recover the penalty; but it is not by their judgment denied, and it seems to me clear, that on the words of this Act of Parliament, although the Attorney-General has a prerogative and the right to bring it before the Court by way of information, he might equally well have brought an action of debt to recover the penalty for the Crown, and I agree with the opinion of Martin, B., in *Att.-Gen.* v. *Radloff*, that when it is found that the Attorney-General can either bring an information in the Exchequer or bring an action of debt, it is inconsistent with the true view of the criminal law of England to say, that by proceeding in one form rather than in the other, he, under the

(*b*) 8 A. C. 354.

same circumstances, can make in the one case that a crime which in the other case can only be treated as a debt (*c*). Therefore I am of opinion that the proceedings under this Act of Parliament by the Attorney-General, although it is a proceeding which could be taken only by him and not by a private individual, is in the nature of a civil proceeding.

3.

R. v. KERSWILL.

[1895] 1 Q. B. 1.

By s. 66 of the Town Police Clauses Act, 1847, it was provided that "If any person refuse to pay on demand to any proprietor or driver of any hackney carriage the fare allowed by this . . . Act, or any by-law made thereunder, such fare may, together with costs, be recovered before one justice as a penalty." *Held*, that the non-payment of the fare was not an offence which could be the subject of a *conviction* under s. 5 of the Summary Jurisdiction Act, 1879, but that it remained a civil debt, recoverable under ss. 6 and 35 of that Act.

CHARLES, J.—I think that on the true construction of s. 66 of the Town Police Clauses Act, 1847, **this is a civil debt, and** that, **although** that section says **it may be recovered as a penalty, its essential character is thereby in no way altered. It is clear that the mere statement in an Act of Parliament that a sum is recoverable as a penalty does not turn the non-payment of what is merely a debt into an offence.** The authority for that is to be found in *R.* v. *Master* (*a*). One

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(*c*) It had been argued that the offence against the Act was, like a libel or an assault, both of a civil and criminal nature. The answer to that argument was that, in those cases, the cause of action is not the same as the ground of the indictment. "When a person sues in an action for libel or assault, he does not sue on behalf of the public, or because the public are injured by the libel or assault, or because there was a danger of producing a breach of the peace, which is the ground on which an indictment is founded, but he sues for the injury done to him by the libel or assault. That is the cause of action. That is a ground for which the Crown cannot maintain a suit and for which only a private person can sue" [14 Q. B. D. at p. 691].

(*a*) L. R. 4 Q. B. 285.

has, then, to ascertain how the sum of money in question here is to be recovered, and we are thrown back to the Railways Clauses Consolidation Act, 1845, which provides that it may be recovered on complaint; that it may be levied by distress, and in default of a sufficient distress that the person from whom it is recoverable may be imprisoned. In that state of things the Summary Jurisdiction Act, 1879, was passed. S. 5 has reference to the period of imprisonment which may be inflicted for non-payment of any sum of money adjudged to be paid by a *conviction*, or on default of a sufficient distress to satisfy any such sum. S. 6 is directed to the remedy in case of non-payment of a *mere sum "claimed to be due."* Where such sum "is recoverable on complaint to a court of summary jurisdiction, and not on information," it shall "be deemed to be a civil debt, etc." I am of opinion that the sum of money here is clearly within the words, "a sum of money claimed to be due," and therefore I should be clear that s. 6 applied to this case but for the difficulty of the words of exclusion, "and not on information." Here the amount of the fare was claimed on an information. . . . But I think it is tolerably clear that the words "and not on information" . . . are an amplification of the previous part of the clause, and are intended to emphasize the declaration that a sum of money claimed to be due, and recoverable before a court of summary jurisdiction, is really a civil debt which can be recovered only as a civil debt in the manner prescribed by the Act.

Mathew, J.—The words . . . "to be recovered as a penalty" . . . do not, in my opinion, alter the nature of the obligation itself, which remains a *purely civil obligation*, to be enforced either by going to the county court or by applying to a magistrate. . . .

The words "and not on information" need not be acted upon, because, as has been pointed out, the Railways Clauses Consolidation Act, 1845, did not require an information. I think . . . that those words are intended to exclude cases where an information is either required by statute or is the only mode of commencing the proceedings.

4.

SCOTT v. SCOTT.

[1913] A. C. 417.

Under the Judicature Act, 1873, there were two ways of raising questions of law arising in criminal trials—the one where the error was apparent on the face of the record, in which case there was an appeal as of right to the Exchequer Chamber and thence to the House of Lords; and the other where a point of law was raised at the trial and was decided by the Court of Crown Cases Reserved. Subject to these exceptions, the Act provided that "no appeal shall lie from any judgment of the . . . High Court in any criminal cause or matter."

An order was made in a nullity suit that the petition should be heard *in camera*. After the decree had been made absolute the petitioner, by the aid of her solicitor, obtained the transcript of the official shorthand-writer's notes of the proceedings at the hearing and sent copies to three friends. This she did from no wrong motive, but merely in consequence of reports issued by the respondent reflecting on her sanity. The respondent issued a notice of motion, intituled in the cause only, asking that the petitioner and her solicitor might be committed to prison for their contempt of Court by publishing copies of the transcript in contravention of the order that the cause should be heard *in camera*. Upon this motion Bargrave Deane, J., found that the petitioner and her solicitor had been guilty of contempt of Court, and ordered them to pay the costs of the motion. *Held*, by the House of Lords, reversing the Court of Appeal, that this order was not made "in a criminal cause or matter" within s. 47 of the Judicature Act, 1873.

Lord Atkinson.—The . . . proposition for which the respondent contends is, as I understand it, this: that if a superior Court or a Judge of such a Court should make a valid order in a civil suit prohibiting the doing of a particular act, not *per se* a crime, the doing of that act in disobedience to the order becomes a crime, a criminal contempt of court. . . . Of course, if the act prohibited be in itself a crime (*a*), the fact that it has been done in defiance of the prohibition, would necessarily, one would suppose, aggravate the culprit's guilt. But if it be the law that disobedience of the order in itself constitutes a crime, then this result would necessarily seem to

(*a*) In the passage omitted from the text Lord Atkinson had dealt with the various classes of criminal contempt and had pointed out that the acts of the petitioner did not fall within any of them.

follow, that all orders of Court punishing persons in any way for disobedience of this kind cannot be reviewed in the Court of Appeal inasmuch as each of them would have been made "in a criminal cause or matter" within the meaning of the 47th section of the Judicature Act of 1873. The following cases (in addition to those dealing with orders of Justices made at sessions to be presently referred to) may be taken as fair specimens of those cited on behalf of the respondent in support of this . . . proposition: *Lord Wellesley* v. *Earl of Mornington* (*b*), *Seaward* v. *Paterson* (*c*), *Avory* v. *Andrews* (*d*), and *In re Freston* (*e*).

It was contended that these cases show that the disobedience of an order of Court constitutes in itself a crime, a criminal contempt of Court. Unfortunately for this contention, however, they do something more than that; they show, I think, conclusively, that if a person be expressly enjoined by injunction, a most solemn and authoritative form of order, from doing a particular thing, and he deliberately, in breach of that injunction, does that thing, he is not guilty of any crime whatever, but only of a civil contempt of Court. . . .

Some reliance was, in argument, placed upon authorities . . . such as *Reg.* v. *Ferrall* (*f*), to show that the disobedience of an order made by justices of the peace constitutes an indictable offence. . . . The orders referred to are usually made upon the treasurer of a county to pay the costs of prosecutions, or upon a person to pay under the poor law the costs of maintenance of a relative, or upon putative fathers to pay the cost of the maintenance of their illegitimate children. In *Rex* v. *Robinson* (*g*), Lord Mansfield lays it down broadly that disobedience of an order of sessions is an indictable offence at common law. *Rex* v. *Bristow* (*h*), is to a similar effect. . . . This rule of the common law would appear to have sprung out of the necessities of such cases as these. The money ordered to be paid could not be sued for and recovered as a debt, specialty or simple contract, due to the

(*b*) 11 Beav. 181.
(*c*) 30 W. R. 564.
(*d*) [1897] 1 Ch. 545.
(*e*) 11 Q. B. D. 545.
(*f*) 2 Den. C. C. 51.
(*g*) 2 Burr. at p. 804.
(*h*) 6 T. R. 168.

person to whom it was ordered to be paid, and justices had no power to issue writs of attachment to compel obedience to their orders. Indictment was, therefore, the only remedy available. But these orders were not orders made *inter partes* in civil suits, such as orders to hear a civil cause *in camera*, and do not support in any way, in my view, the respondent's . . . proposition. In my opinion that proposition is unsound. . . . Lord Moulton, in his able and elaborate judgment in the Court of Appeal in this case . . . lays down in the following passage what, in my opinion, is the true and sound principle of the law. **"It is only the Legislature that can render criminal an act which is not so by the common law of the land. An order of the Court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the Court, and in proper cases such punishment may include imprisonment. But it does no more. It does not make such disobedience a criminal act** and therefore it is that the Court of Appeal has consistently and without any exception held that orders punishing persons for disobedience to an order of the Court are subject to appeal." This view of the law is not, I think, in conflict with authority, and is logical and rational in itself.

5.

SMITH AND WIFE v. SELWYN.

[1914] 3 K. B. 98.

The plaintiffs claimed damages for a criminal assault by the defendant upon the female plaintiff, and, in their statement of claim, alleged facts which, if proved, would constitute a felony. *Held*, by the Court of Appeal, that a claim for damages based upon a felony committed by the defendant against the plaintiff is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shown for his not having been prosecuted.

Swinfen Eady, L.J.—It is well established that according to the law of England, where injuries are inflicted on an individual under circumstances which constitute a felony, that

felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution. In 1827 in *Stone* v. *Marsh* (*a*), Lord Tenterden, delivering the judgment of the Court of King's Bench, stated the law thus: "There is, indeed, another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action." That is the rule. And then he proceeds to state the ground of the rule. "The rule is founded on a principle of public policy. . . . Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or any equivalent or composition for a felony, without suit, and, of course, cannot be allowed to maintain a suit for such a purpose." In *White* v. *Spettigue* (*b*) the law was laid down in somewhat similar terms by Rolfe, B., who said: "I think the true principle is, that where a criminal, and consequently an injurious, act towards the public has been committed, which is also a civil injury to a party, that party shall not be permitted to seek redress for the civil injury to the prejudice of public justice, and to waive the felony. . . ." The learned judge is there speaking of an injurious act which amounts to a felony. So, too, Cockburn, C.J., in *Wells* v. *Abrahams* (*c*), said: "No doubt it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted." That being the established law, the question arises as to how it is to be enforced where an action is brought upon alleged facts which, if true, disclose a felony . . . . The proper course is . . . to stay the action . . . until criminal proceedings have been taken against the defendant, with leave to the plaintiffs to amend their statement of

(*a*) 6 B. & C., at p. 564.
(*b*) 13 M. & W. at p. 608.
(*c*) L. R. 7 Q. B. at p. 557.

claim and thus give them an opportunity of stating a cause of action without disclosing a felony.

Note.—As appears from this judgment, the rule that a felony cannot be made the subject of a civil action was already well established (see particularly *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561). Doubts had, however, been expressed as to how the rule could be enforced (see *Wells* v. *Abrahams*, L. R. 7 Q. B. 554), and it is those doubts that are now settled by this case.

The prosecution need not be at the suit of the injured person ([1914] 3 K. B., at p. 106; and see *Ex parte Ball*, 10 Ch. D. 667). Nor does the rule apply where the action is not brought against the felon himself (*White* v. *Spettigue*, 13 M. & W. 603), nor where the action is not brought by the person upon whom the felony was committed (*Appleby* v. *Franklin*, 17 Q. B. D. 93). The last exception was discussed and recognised in the case of *Smith* v. *Selwyn*, where, however, it was held that no real distinction could be made between the husband and wife, and that the claim of the husband was too trifling and too interlaced with that of the wife to enable him to maintain an action before prosecution of the defendant.

6.

SHERRAS v. DE RUTZEN.

[1895] 1 Q. B. 918.

By s. 16 of the Licensing Act, 1872, it was provided that any person who "supplies any liquor . . . to any constable on duty . . . shall be liable to a penalty." A police constable on duty was served by the appellant's daughter in his presence. Neither the appellant nor his daughter made any inquiry whether he was on duty, but they had wrongly assumed that he was off duty owing to the fact that he had before entering the house removed the armlet which police constables wear when on duty. The appellant was convicted before a police magistrate and the Court of Quarter Sessions upheld the conviction. *Held*, on appeal, that, as the appellant had acted in a *bonâ fide* belief that the constable was off duty, the conviction must be quashed.

Wright, J.—There are many cases on the subject, and it is not very easy to reconcile them. **There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-**

matter with which it deals, and both must be considered: *Nicholls* v. *Hall* (*a*). One of the most remarkable exceptions was in the case of bigamy. It was held by all the judges, on the statute 1 Jac. 1. c. 11, that a man was rightly convicted of bigamy who had married after an invalid Scotch divorce, which had been obtained in good faith, and the validity of which he had no reason to doubt: *Lolley's Case* (*b*). Another exception, apparently grounded on the language of a statute, is *Prince's Case* (*c*). Apart from isolated and extreme cases of this kind, the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which in the language of Lush, J., in *Davies* v. *Harvey* (*d*), are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Several such instances are to be found in the decisions on the Revenue Statutes, *e.g.*, *Att.-Gen.* v. *Lockwood* (*e*), where the innocent possession of liquorice by a beer retailer was held an offence. So under the Adulteration Acts: *R.* v. *Woodrow* (*f*), as to innocent possession of adulterated tobacco; *Fitzpatrick* v. *Kelly* (*g*) and *Roberts* v. *Egerton* (*h*), as to the sale of adulterated food. So under the Game Acts, as to the innocent possession of game by a carrier: *R.* v. *Marsh* (*i*). So as to the liability of a guardian of the poor whose partner, unknown to him, supplied goods for the poor: *Davies* v. *Harvey* (*k*). To the same head may be referred *R.* v. *Bishop* (*l*), where a person was held rightly convicted of receiving lunatics in an unlicensed house, although the jury found that he honestly and on reasonable grounds believed that they were not lunatics. Another class comprehends some, and perhaps all, public nuisances: *R.* v. *Stephens* (*m*), where the employer was held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders; and so in *R.* v. *Medley* (*n*) and *Barnes* v. *Akroyd* (*o*). Lastly, there

(*a*) L. R. 8 C. P. 322.
(*b*) R. & R. 237.
(*c*) *Post*, p. 13.
(*d*) L. R. 9 Q. B. 433.
(*e*) 9 M. & W. 378.
(*f*) 15 M. & W. 404.
(*g*) L. R. 8 Q. B. 337.
(*h*) L. R. 9 Q. B. 494
(*i*) 2 B. & C. 717.
(*k*) L. R. 9 Q. B. 433.
(*l*) 5 Q. B. D. 259.
(*m*) L. R. 1 Q. B. 702.
(*n*) 6 C. & P. 292.
(*o*) L. R. 7 Q. B. 474.

may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right: see *per* Williams and Willes, JJ., in *Morden* v. *Porter* (*p*), as to unintentional trespass in pursuit of game; *Lee* v. *Simpson* (*q*), as to unconscious dramatic piracy; and *Hargreaves* v. *Diddams* (*r*), as to a *bonâ fide* belief in a legally impossible right to fish. But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of someone whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence. **It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction under s. 16 (2),** since it would be as easy for the constable to deny that he was on duty when asked, or to produce a forged permission from his superior officer, as to remove his armlet before entering the public-house.

(7.

R. v. PRINCE.

(1875) L. R. 2 C. C R. 154.

By s. 55 of the Offences against the Person Act, 1861, it is provided that "Whosoever shall unlawfully take . . . any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother . . . shall be guilty of a misdemeanour." *Held*, that it was no defence that the prisoner *bonâ fide* believed and had reasonable ground for believing that a girl so taken by him was over sixteen.

Blackburn, J. (with whose judgment Cockburn, C.J., Mellor, Lush, Quain, Denman, Archibald, Field, and Lindley, JJ., and Pollock, B., agreed).—The question . . . is reduced to this, whether the words in 24 & 25 Vict. c. 100, s. 55, . . . are to be read as if they were "being under the age of sixteen, and he knowing she was under that age." No such words are

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(*p*) 7 C. B. (N.S.) 641.
(*q*) 3 C. B. 871.
(*r*) L. R. 10 Q. B. 582.

contained in the statute, nor is there the word "maliciously," "knowingly," or any other word used that can be said to involve a similar meaning.

The argument in favour of the prisoner must, therefore, entirely proceed on the ground that, in general, a guilty mind is an essential ingredient in a crime, and that where a statute creates a crime, the intention of the Legislature should be presumed to be to include "knowingly" in the definition of the crime, and the statute should be read as if that word were inserted, unless the contrary intention appears. We need not inquire at present whether the canon of construction goes quite so far as above stated, for **we are of opinion that the intention of the Legislature sufficiently appears to have been to punish the abduction, unless the girl, in fact, was of such an age as to make her consent an excuse, irrespective of whether he knew her to be too young to give an effectual consent, and to fix that age at sixteen.** The section in question is one of a series of enactments, beginning with s. 48, and ending with s. 55, forming a code for the protection of women, and the guardians of young women. . . .

S. 50 enacts, that whosoever shall "unlawfully and carnally know and abuse any girl under the age of ten years" shall be guilty of felony. S. 51, whoever shall "unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years" shall be guilty of a misdemeanour (*a*). It seems impossible to suppose that the intention of the Legislature in those two sections could have been to make the crime depend upon the knowledge of the prisoner of the girl's actual age. It would produce the monstrous result that a man who had carnal connection with a girl, in reality not quite ten years old, but whom he, on reasonable grounds, believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanour, because she was in fact not above the age of ten.

(*a*) These two sections have been repealed, and by the Criminal Law Amendment Act, 1885, the ages of ten and twelve years have been raised respectively to thirteen and sixteen.

It seems to us that the intention of the Legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril if she is below the statutable age. The 55th section, on which the present case arises, uses precisely the same words as those in ss. 50 and 51, and must be construed in the same way, and if we refer to the repealed statute, 4 & 5 Phil. & Mary, c. 8, from the 3rd section of which the words in the section are taken, with very little alteration, it strengthens the inference that such was the intention of the Legislature.

Bramwell, B. (with whose judgment, Kelly, C.B., Cleasby, Pollock, and Amphlett, BB., and Grove, Quain, and Denman, JJ., agreed).—The question in this case depends on the construction of the statute under which the prisoner is indicted. . . . Now the word "unlawfully" means "not lawfully," "otherwise than lawfully," "without lawful cause," such as would exist, for instance, on a taking by a police officer on a charge of felony. . . . The statute, therefore, may be read thus "Whosoever shall take, etc., without lawful cause." Now the prisoner had no such cause, and consequently, except in so far as it helps the construction of the statute, the word "unlawfully" may, in the present case, be left out, and then the question is, has the prisoner taken an unmarried girl under the age of sixteen out of the possession of and against the will of her father? In fact, he has; but it is said not within the meaning of the statute, and that that must be read as through the word "knowingly," or some equivalent word, was in; and the reason given is, that as a rule the *mens rea* is necessary to make any act a crime or offence, and that if the facts necessary to constitute an offence are not known to the alleged offender, there can be no *mens rea*. I have used the word "knowingly"; but it will, perhaps, be said that here the prisoner not only did not do the act knowingly, but knew, as he would have said, or believed, that the fact was otherwise than such as would have made his act a crime; that here the prisoner did not say to himself, "I do not know how the fact is, whether she is under

sixteen or not, and will take the chance," but acted on the reasonable belief that she was over sixteen; and that though if he had done what he did, knowing or believing neither way, but hazarding it, there would be a *mens rea*, there is not one when, as he believes, he knows that she is over sixteen.

It is impossible to suppose that, to bring the case within the statute, a person taking a girl out of her father's possession against his will is guilty of no offence unless he, the taker, knows she is under sixteen; that he would not be guilty if the jury were of opinion he knew neither one way nor the other. Let it be, then, that the question is whether he is guilty where he knows, as he thinks, that she is over sixteen. This introduces the necessity for reading the statute with some strange words introduced; as thus: Whosoever shall take any unmarried girl, being under the age of sixteen, and not believing her to be over the age of sixteen, out of the possession, etc." Those words are not there, and the question is, whether we are bound to construe the statute as though they were, on account of the rule that the *mens rea* is necessary to make an act a crime. I am of opinion that we are not, nor as though the word "knowingly" was there, and for the following reasons: The act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong . . . let us remember what is the case supposed by the statute. . . . It is . . . a *taking* of a *girl*, in the *possession* of some one, *against his will*. . . . **The Legislature has enacted that if anyone does this wrong act he does it at the risk of her turning out to be under sixteen.** *This opinion gives full scope to the doctrine of the mens rea.* If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*: so if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the *act* forbidden by the statute. . . .

In addition to these considerations, one may add that the statute does use the word "unlawfully" and does not use the words "knowingly" or "not believing to the contrary." If the question was whether his act was unlawful, there would be no difficulty, as it clearly was not lawful.

This view of the section, to my mind, is much strengthened by a reference to other sections of the same statute.

DENMAN, J.—I agree in the judgment of my Brothers Bramwell and Blackburn, and I wish what I add to be understood as supplementary to them. . . .

In the present case the jury find that the defendant believed the girl to be eighteen years of age; even if she had been of that age, she would have been in the lawful care and charge of her father, as her guardian by nature: see Co. Litt., 88b, n. 12, 19th ed., recognised in *R.* v. *Howes* (*b*). Her father had a right to her personal custody up to the age of twenty-one, and to appoint a guardian by deed or will whose right to her personal custody would have extended up to the same age. The belief that she was eighteen would be no justification to the defendant for taking her out of his possession, and against his will. By taking her, even with her own consent, he must at least have been guilty of aiding and abetting her in doing an unlawful act, viz. in escaping against the will of her natural guardian from his lawful care and charge. This, in my opinion, leaves him wholly without lawful excuse or justification for the act he did, even though he believed that the girl was eighteen, and therefore unable to allege that what he has done was not unlawfully done, within the meaning of the clause. In other words, **having knowingly done a wrongful act,** viz. in taking the girl away from the lawful possession of her father against his will and in violation of his rights as guardian by nature, **he cannot be heard to say that he thought the girl was of an age beyond that limited by the statute for the offence charged against him.** He had wrongfully and knowingly violated the father's rights against the father's will. And **he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing.**

(*b*) 3 E. & E. 332.

8.

R. v. TOLSON.

(1889) 23 Q. B. D. 168 (C. C. R.).

A. married T. in September, 1880. In November, 1881, T. deserted her, and as a result of her inquiries she believed that he had been lost in a vessel which went down with all hands on board. In January, 1887, A., believing herself to be a widow, went through the ceremony of marriage with Y. The circumstances were known to Y. and there was no concealment of the ceremony. *Held*, that A. could not be convicted of bigamy (*a*).

Stephen, J.—My view of the subject is based upon a particular application of the doctrine usually, though I think not happily, described by the phrase, *non est reus, nisi mens sit rea*. Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a *mens rea* or "guilty mind," which is always expressly or by implication involved in every definition. This is obviously not the case, for **the mental elements of different crimes differ widely.** *Mens rea* means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to

(*a*) Bigamy is an offence against s. 57 of the Offences Against the Person Act, 1861, whose material terms, so far as concerns this case and the case of *R.* v. *Wheat* (*post*, p. 25), are as follows: "Whosoever, being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony. . . . Provided that nothing in this section contained shall extend . . . to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or . . . to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage."

describe a mere absence of mind as *mens rea* or guilty mind. The expression again is likely to and often does mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives, in other words, that immorality is essential to crime.

The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition.

Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one of the words "maliciously," "fraudulently," "negligently," or "knowingly," but it is the general—I might, I think, say, the invariable—practice of the Legislature to leave unexpressed some of the mental elements of crime. In all cases whatever competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined.

The meaning of the words "malice," "negligence," and "fraud" in relation to particular crimes has been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the Malicious Mischief Act, and a third in relation to libel, and so of fraud and negligence.

With regard to the knowledge of fact, the law perhaps is not quite so clear, but it may, I think, be maintained that in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. To take an extreme illustration, can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations of

the same sort might be given. I will mention one or two glaring ones. *Levet's Case* (*b*) decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar to be, killed a person who was not a burglar, was held not to be a felon, though he might be (it was not decided that he was) guilty of killing *per infortunium*, or possibly *se defendendo*, which then involved certain forfeitures. In other words, he was in the same situation as far as regarded the homicide as if he had killed a burglar. In the decision of the judges in *Macnaghten's Case* (*c*) it is stated that if under an insane delusion one man killed another, and if the delusion was such that it would, if true, justify or excuse the killing, the homicide would be justified or excused. This could hardly be if the same were not law as to a sane mistake. A *bonâ fide* claim of right excuses larceny and many of the offences against the Malicious Mischief Act. Apart, indeed, from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. . . . I think therefore that the case reserved falls under the general rule as to mistakes of fact, and that the conviction ought to be quashed.

I will now proceed to deal with the arguments which are supposed to lead to the opposite result.

It is said, first, that the words of 24 & 25 Vict., c. 100, s. 57, are absolute, and that the exceptions which that section contains are the only ones which are intended to be admitted, and this it is said, is confirmed by the express proviso in the section—an indication which is thought to negative any tacit exception. It is also supposed that the case of *R.* v. *Prince*, decided on s. 55, confirms this view. . . .

In the first place I will observe upon the absolute character of the section. It appears to me to resemble most of the enactments contained in the Consolidation Acts, of 1861, in passing over the general mental elements of crime which are presupposed in every case. Age, sanity, and more or less

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(*b*) 1 Hale 474. (*c*) *Post*, p. 29.

freedom from compulsion, are always presumed, and I think it would be impossible to quote any statute which in any case specifies these elements of criminality in the definition of any crime. It will be found that either by using the words "wilfully and maliciously," or by specifying some special intent as an element of particular crimes, knowledge of fact is implicitly made part of the statutory definition of most modern definitions of crimes, but there are some cases in which this cannot be said—such as s. 55, on which *Reg.* v. *Prince* was decided, s. 56, which punishes the stealing of "any child under the age of fourteen years," s. 49, as to procuring the defilement of any "woman or girl under the age of twenty-one" (*d*), in each of which the same question might arise as in *Reg.* v. *Prince*, to these I may add some of the provisions of the Criminal Law Amendment Act, 1885. . . .

All the judges . . . in *Reg.* v. *Prince* . . . except Lord Esher, considered that the object of the Legislature being to prevent a scandalous and wicked invasion of parental rights (whether it was to be regarded as illegal apart from the statute or not) it was to be supposed that they intended that the wrongdoer should act at his peril.

As another illustration of the same principle, I may refer to *R.* v. *Bishop* (*e*). . . . The application of this to the present case appears to me to be as follows. The general principle (*e*) is clearly in favour of the prisoners, but how does the intention of the Legislature appear to have been against them? It could not be the object of Parliament to treat the marriage of widows as an act to be if possible prevented as presumably immoral. The conduct of the woman convicted was not in the smallest degree immoral, it was perfectly natural and legitimate. . . . It appears to me that every argument which shewed in the opinion of the Judges in *Reg.* v. *Prince* that the Legislature meant seducers and abducters to act at their peril, shews that the Legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the

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(*d*) This section was repealed by the Criminal Law Amendment Act, 1885, which extended the provisions of the Act of 1861.

(*e*) *Ante*, p. 12.

parties, to be a valid and honourable marriage, with a liability to seven years' penal servitude.

It is argued that the proviso that a re-marriage after seven years' separation shall not be punishable, operates as a tacit exclusion of all other exceptions to the penal part of this section. It appears to me that it only supplies a rule of evidence which is useful in many cases, in the absence of explicit proof of death. But it seems to me to shew not that belief in the death of one married person excuses the marriage of the other only after seven years' separation, but that mere separation for that period has the effect which reasonable belief of death caused by other evidence would have at any time.

Wills, J.—There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past.

It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent. "It is a principle of natural justice and of our law," says Lord Kenyon, C.J., "that *actus non facit reum, nisi mens sit rea.* The intent and act must both concur to constitute the crime": *Fowler* v. *Padget* (*ee*). The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute—fornication or seduction, for instance—which nevertheless no one would hesitate to call wrong; and the intention to do an act wrong in this sense at the least must as a general rule exist before the act done can be considered a crime. Knowingly and intentionally to

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(*ee*) 7 T. R. 509, 514.

break a statute must, I think, from the judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance and excusing the breach of the law.

Although primâ facie and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such bye-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the bye-law that the person committing it had *bonâ fide* made an accidental miscalculation or an erroneous measurement. The Acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril. Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable. . . . It is suggested . . . that the important decision of the Court of fifteen judges in *Reg.* v. *Prince* is an authority in favour of a conviction in this case. I do not think so. In *Reg.* v. *Prince* the prisoner was indicted under 24 & 25 Vict. c. 100, s. 55, for unlawfully taking an unmarried girl, then being under the age of sixteen years, out of the possession and against the will of her father. The jury found that the prisoner *bonâ fide* believed upon reasonable

grounds that she was eighteen. The Court . . . upheld the conviction. Two judgments were delivered by a majority of the Court, in each of which several judges concurred, whilst three of them, Denman, J., Pollock, B., and Quain, J., concurred in both. The first of the two, being the judgment of nine judges, upheld the conviction upon the ground that, looking to the subject-matter of the enactment, to the group of sections amongst which it is found, and to the history of legislation on the subject, the intention of the Legislature was that if a man took an unmarried girl under sixteen out of the possession of her father against his will, he must take his chance of whether any belief he might have about her age was right or wrong, and if he made a mistake upon this point so much the worse for him; he must bear the consequences. The second of the two judgments, being that of seven judges, gives a number of other reasons for arriving at the same conclusion, some of them founded upon the policy of the Legislature as illustrated by other associated sections of the same Act. This judgment contains an emphatic recognition of the doctrine of the "guilty mind" as an element, in general, of a criminal act, and supports the conviction upon the ground that the defendant, who believed the girl to be eighteen and not sixteen, even then, in taking her out of the possession of the father against his will, was doing an act wrong in itself. "This opinion," says the judgment, "gives full scope to the doctrine of the *mens rea*" (*f*).

The case of *Reg.* v. *Prince*, therefore, is a direct and cogent authority for saying that the intention of the Legislature cannot be decided upon simple prohibitory words, without reference to other considerations. The considerations relied upon in that case are wanting in the present case, whilst, as it seems to me, those which point to the application of the principle underlying a vast area of criminal enactment, that there can be no crime without a tainted mind, preponderate greatly over any that point to its exclusion.

In my opinion, therefore, this conviction ought to be quashed.

(*f*) Note also the judgment of Denman, J., in the same case.

(9.)

R. v. WHEAT.

[1921] 2 K. B. 119.

A belief in good faith and on reasonable grounds that the accused person has been divorced when in fact he has not been divorced affords no defence to a charge of bigamy.

Judgment of the Court of Criminal Appeal, delivered by:

Avory, J. (after referring to the words of the statute and the exceptions in the proviso (*a*) the learned Judge continued)—It has been decided in the case of the first exception that upon proof of the continuous absence for seven years the person accused is entitled to an acquittal in the absence of proof by the prosecution that the person accused knew that the wife or husband, as the case may be, was living within that time, and as the Attorney-General has pointed out in his argument for the Crown this exception creates or involves a presumption of death, which, unless rebutted by the prosecution, entitles the accused to an acquittal; in other words the person accused is presumed to believe under such circumstances that the former wife or husband is dead at the time of the second marriage, and therefore has **no intention of doing the act forbidden by the statute**—namely, marrying during the life of the former husband or wife. In the case of the second exception there is no indication in the statute that any presumption or belief is to afford any defence; the words do not admit of any such qualification, and the only defence under this head appears to be that the accused has in fact been divorced from the bond of the first marriage. If he has not, then at the time of the second marriage he is a person who, being married, **intends to do the act forbidden by the statute**—namely, "to marry during the life of the former wife." Having regard to the distinction between the two exceptions, we are of opinion that a *bonâ fide* belief on reasonable grounds that the person accused has been divorced, when in fact he has not been

(*a*) See *ante*, p. 18, note (*a*).

divorced, affords no defence in law to the charge of bigamy, although it may afford good reason for the infliction of a nominal punishment, and in our opinion this decision is not in conflict with the decision of the majority of the judges in *Reg.* v. *Tolson*, but is in accord with the principle of the judgment in *Reg.* v. *Prince*. In *Reg.* v. *Tolson* the person accused believed on reasonable grounds that her husband was dead; therefore she did not intend at the time of the second marriage to do the act forbidden by the statute—namely, to marry during his life, and it was said in that case that the exception in the proviso showed that mere separation for seven years has the effect which reasonable belief of death caused by other evidence would have at any other time: see particularly the judgment of Stephen, J. (*b*). It is true that the judgment in *Reg.* v. *Tolson*, though influenced to a great extent by that proviso, proceeded mainly on the application of the maxim *Actus non fecit reum, nisi mens sit rea*—a maxim admitted to be uncertain and often misleading in its application, but it was limited in that case to the belief in the death of the former husband, and the case now in question of a belief in a divorce having been obtained was not discussed or considered. In our opinion the maxim in its application to this statute is satisfied if the evidence establishes an intention on the part of the person accused to do the act forbidden by the statute—namely, "being married, to marry another person during the life of the former wife or husband": see the judgment of Bramwell, B., in *Reg.* v. *Prince* (*c*), as to the application of this maxim, and *Bank of New South Wales* v. *Piper* (*d*).

(*b*) *Ante*, p. 18.
(*c*) *Ante*, p. 15.
(*d*) [1897] A. C. 383, 390.

10.

CUNDY v. LE COCQ.

(1884) 13 Q. B. D. 207.

The Licensing Act, 1872, provided that "If any licensed person . . . sells any intoxicating liquor to any drunken person, he shall be liable to a penalty. . . ." *Held*, that knowledge of the condition of the person to whom the liquor was sold was not necessary to constitute the offence.

STEPHEN, J.—I am of opinion that this conviction should be affirmed. Our answer to the question put to us turns upon this, whether the words of the section under which the conviction took place, taken in connection with the general scheme of the Act, should be read as constituting an offence only where the licensed person knows or has means of knowing that the person served with intoxicating liquor is drunk, or whether the offence is complete where no such knowledge is shewn. I am of opinion that **the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a** *bonâ fide* **mistake as to the condition of the person served is not an answer to the charge,** but is a matter only for mitigation of the penalties that may be imposed. I am led to that conclusion both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head "offences against public order." Some of these contain the word "knowingly," as for instance s. 14, which deals with keeping a disorderly house, and s. 16, which deals with the penalty for harbouring a constable. Knowledge in these and other cases is an element in the offence; but the clause we are considering says nothing about the knowledge of the state of the person served. I believe the reason for making this prohibition absolute was that there must be a great temptation to a publican to sell liquor without regard to the sobriety of the customer, and it was thought right to put upon the publican the responsibility of determining whether his customer is sober. Against this view we have had quoted the maxim that in

every criminal offence there must be a guilty mind: but I do not think that maxim has so wide an application as it is sometimes considered to have. In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now as illustrated by the cases of *Reg.* v. *Prince* (*a*) and *Reg.* v. *Bishop* (*b*) to apply the maxim generally to all statutes, and the substance of all the reported cases is that **it is necessary to look at the object of each act that is under consideration to see whether and how far knowledge is of the essence of the offence created.** Here, as I have already pointed out, the object of this part of the Act is to prevent the sale of intoxicating liquor to drunken persons, and it is perfectly natural to carry that out by throwing on the publican the responsibility of determining whether the person supplied comes within that category.

11.

R. v. DUKE OF LEINSTER.

(1924) 93 L. J. K. B. 144.

By s. 155 of the Bankruptcy Act, 1914, "Where an undischarged bankrupt (a) either alone or jointly with any other person obtains credit to the extent of ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt . . . he shall be guilty of a misdemeanour." *Held*, by the Court of Criminal Appeal, that it is no defence that the bankrupt took steps to have such information conveyed or that he had reasonable grounds to believe that it had been conveyed, if in fact it had not.

Judgment of the Court of Criminal Appeal, delivered by:

Lord Hewart, C.J.—There is no doubt that neither the appellant himself, nor any agent on his behalf, informed Straker Squire, Lim. [from whom credit was obtained] of the fact that the appellant was an undischarged bankrupt before they gave him credit. It is true that the appellant did instruct

(*a*) L. R. 2 C. C. R. 154. (*b*) 5 Q. B. D. 259.

his agent to inform them of the fact, and he had reasonable grounds to believe that the agent had done so; but, in fact, the agent had not carried out his instructions. **It is necessary,** therefore, **to refer to the words of the statute and to see what its object is.** . . . If it had been intended that the section should mean something different from that which, *primâ facie*, it does mean, it could have been differently worded. **The words "wilfully" or "knowingly" or "fraudulently" could have been inserted. But they are not, and an absolute obligation is imposed by the section on undischarged bankrupts to convey the information. If it were otherwise, the section would be, to a great extent, nugatory. The object of the statute clearly is to protect persons from whom the bankrupt seeks to obtain credit,** and, if the information is not conveyed, then, in the opinion of the Court, whatever the state of mind of the bankrupt may be, the offence is committed. It is not sufficient to instruct an agent to convey the information or to have reasonable grounds to believe that he has carried out such instructions. There is an absolute obligation on the undischarged bankrupt to give the information.

12.

McNAGHTEN'S CASE.

(1843) 10 Cl. and Fin. 200.

Daniel McNaghten having been indicted and found "not guilty" on the ground of insanity the verdict and the nature and extent of the unsoundness of mind which would excuse a felony of this sort became the subject of debate in the House of Lords, and it was determined to take the opinion of the Judges on the law governing such cases. Accordingly certain questions of law were propounded to them, in answer to which all the Judges with the exception of Maule, J., concurred in the following reply.

The first question proposed by your Lordships is this:

What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where at the

time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, **if he knew at the time of committing such crime that he was acting contrary to law: by which expression we understand to mean the law of the land.**

Your Lordships are pleased to inquire of us, secondly, "What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example) and insanity is set up as a defence?" And, thirdly, "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that **every man is to be presumed to be sane,** and to possess a sufficient degree of reason to be responsible for his crimes, **until the contrary be proved** to their satisfaction; and that **to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.** The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at

the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put **with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged.** If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land he is punishable; and the usual course, therefore, has been to leave the question to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course we think is correct accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your Lordships have proposed to us is this: "If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof is he thereby excused?" To which question the answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labours under such **partial delusion** only, and is not in other respects insane, we think **he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.** For example, if, under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury he would be liable to punishment.

The question lastly proposed by your Lordships is: "Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime? or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusions at the time?" In answer thereto, we state to your Lordships that we think the medical man under the circumstances supposed cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is inadmissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

13.

FELSTEAD v. DIRECTOR OF PUBLIC PROSECUTIONS.

(1914) 83 L. J. K. B. 1132 (H. L.).

The appellant was indicted for wounding with intent to do grievous bodily harm. The jury returned a special verdict in accordance with s. 2 (1) of the Trial of Lunatics Act, 1883, that the appellant was guilty but insane. *Held*, by the House of Lords, that the appellant had no right of appeal to the Court of Criminal Appeal against that part of the verdict which found him to be insane at the time of doing the act.

Lord Reading.—The sole question for the decision of this House is whether an accused person who, by the special verdict, is found guilty of the act, but insane at the time, can appeal to the Court of Criminal Appeal against that part of

the verdict which finds that he was insane at the time of doing the act. If there is any right of appeal it can only be that conferred by the Criminal Appeal Act, 1907. This Act was passed to establish a Court of Criminal Appeal and to amend the law relating to appeals in criminal cases, and there is no right of appeal to the Court of Criminal Appeal, and no jurisdiction in that Court to hear an appeal, unless the appellant can bring himself within that statute.

By s. 3 of the Criminal Appeal Act, 1907, "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal," and unless a person is "a person convicted on indictment" there is no right of appeal against the verdict or any part of it; therefore the question is whether by reason of the special verdict under the Trial of Lunatics Act, 1883, or any part of such verdict, the accused is "a person convicted on indictment."

In order to understand fully the effect of such a special verdict it is well to examine the history of the law before the passing of the Trial of Lunatics Act, 1883.

In the earliest times proof of insanity when he committed the act charged did not entitle the accused to an acquittal, but to a special verdict carrying with it a right to a pardon. The same course was taken when the accused had killed a man by misadventure or in self-defence—see 1 Rot. Parl. 444; 3 Edw. 2 (1310), and FitzHerbert's Grand Abridgement, sub tit. "Corone," s. 351.

At a later period the jury in cases of insanity could either find a general verdict of not guilty, or a special verdict that the accused committed the act, but that at the time he was *non compos mentis*, and thereupon the Court gave judgment of acquittal—see Hale's Pleas of the Crown (ed. of 1880), vol. i. s. 28, and Sir Michael Foster's Crown Law (3rd ed.), s. 1, p. 279. It is to be observed that in such cases the result of either a general or a special verdict was the acquittal of the accused, and in the words of the preamble of the subsequent statute of 1800 "it may be dangerous to permit persons so acquitted to go at large." In the public interest it became necessary to provide for the safe custody of the insane person

notwithstanding the verdict of acquittal. Consequently the statute of 1800 (39 & 40 Geo. 3. c. 94), entitled "An Act for the safe custody of Insane Persons charged with Offences," was passed. It was there enacted "that in all cases where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offence, the Court before whom such trial shall be had, shall order such person to be kept in strict custody, in such place and in such manner as to the Court shall seem fit, until His Majesty's pleasure shall be known."

The intention of the Legislature, as manifested by this statute, was to provide for the safe custody of persons who were found by the jury to be insane (a) at the time of committing the offence, or (b) upon arraignment, or (c) upon trial, or (d) upon being brought before any Court to be discharged for want of prosecution. In the last-mentioned case, it will be observed upon examination of s. 2 that if even a person brought before the Court to be discharged for want of prosecution should appear to be insane, the Court was empowered to empanel a jury to try his sanity, and if the jury found him insane the Court could order his detention for safe custody during his Majesty's pleasure.

Under this statute the finding of the jury that the accused was insane at the time of committing the offence was not a conviction of any offence, but was an acquittal on account of insanity empowering the Court to order the safe custody of the accused during His Majesty's pleasure. The alteration in the law made with reference to a person insane at the time of committing the offence charged against him was that although he was acquitted of the crime he was detained as a lunatic. As Lord Denman, C.J., said in *Reg.* v. *Oxford* (*a*), "the

(*a*) 9 C. & P. 525.

statute must mean that the jury are to find, that that act has been done by the prisoner which fixes him as a criminal unless he is a lunatic," implying that if he is a lunatic he is not a criminal, and is not convicted of any offence.

The last stage was the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), which is the statute now applicable. It made no substantial difference in the administration of the law, except that it enacted that where upon evidence the jury are satisfied that the accused did the act charged, but was insane so as not to be responsible according to law for his actions at the time when he did the act, they must return a special verdict to that effect. That is not a verdict that the accused was guilty of the offence charged, but that he was guilty of the act charged as an offence. In other words, this verdict means that upon the facts proved the jury would have found him guilty of the offence had it not been established to their satisfaction that he was at the time not responsible for his actions, and therefore could not have acted with a "felonious" or "malicious" mind, which is an essential element of the crime charged against him

The indictment of the appellant was for "feloniously" and "maliciously" wounding Lilian Ann Felstead, with intent to do some grievous bodily harm. It is obvious that if he was insane at the time of committing the act he could not have had a *mens rea*, and his state of mind could not then have been that which is involved in the use of the term "feloniously" or "maliciously," for *crimen non contrahitur, nisi voluntas nocendi intercedat*. It was further argued that, as the Trial of Lunatics Act, 1883, provided under s. 2 that where such a special verdict is found the accused should be kept in custody as a criminal lunatic, the Legislature must have intended the special verdict to operate as a conviction of a crime. In my judgment this contention is not well founded. By the use of the term "criminal lunatic" the Legislature meant by a compendious reference to bring into operation the powers given under the statute of 1860 (23 & 24 Vict. c. 75), which provided for detention in certain asylums, and under certain conditions, both of persons found insane and acquitted

under the afore-mentioned Act of 1800 and of convicted persons who became insane during confinement in prison.

It was also contended that, as by s. 20 of the Criminal Appeal Act, 1907, writs of error and other modes of bringing a verdict and judgment under review had been abolished, the Legislature must have intended to give a right of appeal to the Court of Criminal Appeal whenever such a special verdict was found. It must, however, be borne in mind that your Lordships are deciding the proper interpretation to be placed upon the words of the statute, and cannot extend the right of appeal to those who, in your Lordships' opinion, are not persons "convicted on indictment."

I have for these reasons come to the conclusion that the appellant is not a "person convicted on indictment." By the verdict of the jury he has been acquitted of the crime, and the order for his detention for safe custody is consequent upon the finding of insanity, and is not for a fixed period, but during His Majesty's pleasure.

The effect of this conclusion is to affirm the decision of the Court of Criminal Appeal that they had no jurisdiction to hear and determine the appeal of the appellant.

14.

R. v. MEADE.

[1909] 1 K. B. 895.

The prisoner was charged with the murder of a woman. He had brutally ill-treated her during a great part of the night on which she died and her death was due to the rupture of an intestine, caused by a blow with his fist. The defence was that he was drunk and did not intend to cause death or grievous bodily harm, and consequently that the verdict should be manslaughter. Lord Coleridge, J., directed the jury as follows: "In the first place, everyone is presumed to know the consequences of his acts. If he be insane, that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive (*a*), shall exist in the mind of the man who does

(*a*) Meaning "intent"; see the end of the sentence, and see also *Director of Public Prosecutions* v. *Beard* [1920] A. C. at p. 502.

the act, the law declares this—that if the mind at that time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter. *Held*, that this direction was right.

Judgment of the Court of Criminal Appeal, delivered by:

Darling, J.—In this case the question to be decided arises out of certain words used by Lord Coleridge, J., in summing up to the jury. Complaint is made as to certain words used by him in leaving to the jury considerations applicable to the case of a man who, being drunk at the time, has done acts which result in the death of another, with whose murder he is charged. I will deal with these words presently; but it is necessary before doing so to deal with the history of the doctrine of the effect of drunkenness upon a charge of a crime such as murder, where the question of intent is involved. Originally the law was that although an insane person was not liable to the same consequences and ought not to be judged by the same standard as a sane one, yet, if he was suffering from *dementia affectata*, that is, a temporary insanity caused by the accused's own voluntary act in getting drunk, then drunkenness was no excuse for crime: 1 Hawkins' "Pleas of the Crown," c. 1, s. 6, where it is said, "And he who is guilty of any crime whatever through his voluntary drunkenness shall be punished for it as much as if he had been sober." The law stood as thus expressed for many years, and, as far as we know, the point was first decided in a contrary sense in *R.* v. *Grindley* (*b*), decided in the year 1819. Since then there have been many decisions in which judges have attempted to express the doctrine that where intent is of the essence of a crime with which a person is charged, that intent may be disproved by shewing that at the time of the commission of the act charged the prisoner was in a state of drunkenness, in which state he was incapable of forming the intent. Different judges have expressed themselves differently, but not so differently as to be irreconcilable and to prevent the Court from saying that they were expressing the same doctrine. The two authorities

(*b*) 1 Russ. on Crimes (6th ed.), 144. The case itself is no longer law, see *Director of Public Prosecutions* v. *Beard* [1920] A. C. at p. 495.

which bear most upon the point are *R.* v. *Monkhouse* (*c*) and *R.* v. *Doherty* (*d*), the first decided by Coleridge, J., and the second by Stephen, J., and no doubt identical expressions were not used in each. But it is necessary to repeat what has often been said before in this Court, namely, that when a judge sums up to a jury he must not be taken to be inditing a treatise on the law. He addresses himself to the particular facts of the case then before the jury, and no judge can affect, in those circumstances, to give an exhaustive definition, or one which applies to every conceivable case. It is enough if he gives a sufficient definition, and rightly directs the attention of the jury to the facts of the case before them. That is true of the present case. I have stated what the ancient view was, and that it is not now in accordance with the law. We do not consider it any part of our duty to enlarge the rule of law or to use language wider than that used by the judges who had considered the question before, for it is not our duty to say anything which will confer an immunity greater than that which they already enjoy on persons who have voluntarily made themselves drunk. On behalf of the prisoner it was said that the words used by Lord Coleridge, J., would induce the jury to suppose that unless they found the appellant insane they would not be justified in finding him guilty of manslaughter. But he had expressly told the jury that there was no plea of insanity. That was sufficient to warn the jury not to make such a mistake. The appellant brutally ill-treated the deceased woman during a great part of the night on which she died, he said that he would give her a good hiding, and he broke a broomstick over her. He struck her a blow on the top of the nose, and, as she fell towards him, gave her a violent blow with his fist on the lower part of the body, which ruptured an intestine, and she died during the night. If he did do this and she died of the injury, and he intended to inflict serious bodily injury on her, he was guilty of murder. It was contended at the trial that the presumption that the prisoner had this intent was rebutted because he, by reason of

(*c*) 4 Cox C. C. 55.
(*d*) 16 Cox C. C. 306.

drunkenness, had no such intent. It then became the duty of Lord Coleridge, J., to lay down the rule as to the nature of the drunkenness which would be sufficient to satisfy them that the prisoner had not that intent. **We desire to state the rule in the following terms: A man is taken to intend the natural consequences of his acts. This presumption may be rebutted —(1) in the case of a sober man in many ways: (2) it may also be rebutted in the case of a man who is drunk, by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted.**

In our opinion this doctrine was not expressed by Lord Coleridge, J., in such a way as to mislead the jury into thinking that insanity must be proved. We have carefully considered the words used by him. We have been unable to trace some of them to the language used previously by judges. But a judge is not condemned to use no words which are not commonplace. It is said that some of the language used by Lord Coleridge, J., is picturesque and figurative. No doubt; but it is quite easy to say in picturesque and figurative language that which is true. We cannot say that the language of Lord Coleridge, J., differs in its meaning from the rule we have just laid down. It is unnecessary to criticize the very words used. Unless we think them misleading and calculated to lead the jury to think that something equivalent to absolute insanity must be proved to entitle them to bring in a verdict of manslaughter, this appeal ought to be dismissed. After having carefully considered the authorities and the language used by Lord Coleridge, J., we have come to the conclusion that there is nothing in the words used by him which is contrary to the rule we have laid down or to former decisions, and that the appeal ought, therefore, to be dismissed.

15.

DIRECTOR OF PUBLIC PROSECUTIONS v. BEARD.

[1920] 14 Cr. App. R. 159 (H. L.).

Drunkenness as a defence. [The facts appear from the speeches.]

The Lord Chancellor.—My Lords, Arthur Beard was convicted of murder at Chester Assizes, and sentenced to death. The Court of Criminal Appeal quashed the conviction and substituted a verdict of manslaughter and a sentence of twenty years' penal servitude. The case is brought to your Lordships' House under s. 1 (6) of the Criminal Appeal Act, 1907, upon the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional importance. The facts which are relevant may be shortly stated. About 6 p.m., or a little later, on July 25, 1919, a girl of thirteen years of age was sent by her father to purchase some small articles at a shop. About half-past six she was seen entering the gate which leads into Carfield Mill. The only person then at the mill was the prisoner Beard, who was there in the discharge of his duty as night watchman. He proceeded to have carnal knowledge of the girl by force, and, when she struggled to escape from him, he placed his hand over her mouth, and his thumb on her throat, thereby causing her death by suffocation. There was some, but not much evidence that the prisoner was under the influence of intoxicating liquor on the day and at the time in question. . . .

Counsel for the defence did not dispute the prisoner's criminal responsibility for the homicide of the girl. The only defence presented was that, in the circumstances proved, the verdict should be manslaughter, and not murder, on the ground that there was no intention on the part of the prisoner to cause the girl's death, and that he was in such a drunken condition that he was incapable of knowing that what he was doing was likely to inflict serious injury within the rule laid down by the Court of Criminal Appeal in *The King* v.

Meade (*a*). Mr. Justice Bailhache carefully reviewed the evidence and gave the following direction of law to the jury: "It is no defence to say, 'I should not have done that wicked thing if I had not been so drunk.' But if he has satisfied you by evidence that he was so absolutely drunk at the time that he really did not know what he was doing or did not know that he was doing wrong, then the defence of drunkenness succeeds to this extent—that it reduces the crime from murder to manslaughter. What I mean by that is a sort of thing like this: Supposing he cuts a woman's throat under the impression that he is cutting the throat of a pig, then the crime of murder is reduced to the crime of manslaughter. But if a man says, 'I was mad, and turned into a brute by drink,' it is no defence, unless he satisfies you that he was so far out of his senses that he did not know what he was doing." The jury after a very brief consideration returned a verdict of murder.

In the Court of Criminal Appeal two separate and independent points of misdirection were raised on behalf of the prisoner: (1) that the learned judge should have told the jury that if they were of opinion that the violent act which was the immediate cause of death was not intentional, but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter; and (2) that the learned judge wrongly directed the jury on the defence of drunkenness, and gave a direction which was not in accordance with the decision in *Meade's Case*, and was applicable only to the defence of insanity. The first objection failed, the Court being of opinion (apart from the defence of drunkenness) that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The Court held that by the law of England such an act was murder. No attempt has been made in your Lordships' House to displace this view of the law, and there can be no doubt as to its soundness. With regard to the second objection, the Court of Criminal Appeal, holding itself bound, by previous decisions

(*a*) [1909] 1 K. B. 895, *ante*, p. 36.

of its own, to the view that *The King* v. *Meade* laid down a general code, came to the conclusion that the learned Judge had given a direction which was calculated to mislead the jury by imposing a test applicable only to the defence of insanity, instead of the test, imagined to be generally laid down in *Meade's Case*, for application to the defence of drunkenness. The Court was not satisfied that the verdict would have been the same if the proper direction had been given, and substituted a verdict of manslaughter for that of murder. . . .

In *Meade's Case* the authorities were reviewed by the Court of Criminal Appeal, and a rule was laid down which has been treated as general and authoritative by judges of first instance, and by the Court of Criminal Appeal, both in earlier cases and in the present case. It has been contended before your Lordships that whilst the decision in *Meade's Case* may have been right upon the facts there proved, it is an authority of limited and not of general application; that in its limited application *Meade's Case* did not affect the present case, and that consequently there was no misdirection. It becomes necessary, in view of this contention, to consider the state of the law before *Meade's Case* and to examine the authority of this decision.

Under the law of England as it prevailed until early in the nineteenth century voluntary drunkenness was never an excuse for criminal misconduct; and, indeed, the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. This view was in terms based upon the principle that a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man. . . . Judicial decisions extending over a period of nearly one hundred years make it plain that the rigidity of this rule was gradually relaxed in the nineteenth century, though this mitigation cannot for a long time be affiliated upon a single or very intelligible principle. . . .

[The Lord Chancellor here reviewed these decisions and then continued]:

Notwithstanding the difference in the language used, I

come to the conclusion that (except in cases where insanity is pleaded) these decisions establish that **where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime.** If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was only committed if the intent was proved. This does not mean that the drunkenness in itself is an excuse for the crime, but that the state of drunkenness may be incompatible with the actual crime charged, and may, therefore, negative the commission of that crime. In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm, unlawful homicide with malice aforethought is not established and he cannot be convicted of murder. But, nevertheless, unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter. (*Per* Mr. Justice Stephen in *Doherty's Case*) (*b*). This reasoning may be sound or unsound; but whether the principle be truly expressed in this view, or whether its origin is traceable to that older view of the law held by some civilians (as expressed by Hale) that, in truth, it may be that the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself, the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter.

The conclusions to be drawn from these cases may be stated under three heads:

(1) **That insanity whether produced by drunkenness or otherwise is a defence to the crime charged.** The distinction

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(*b*) 16 Cox C. C. 307.

between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention has been preserved throughout the cases. The insane person cannot be convicted of a crime (*R.* v. *Felstead* (*c*)), but, upon a verdict of insanity, is ordered to be detained during His Majesty's pleasure. **The law takes no note of the cause of the insanity. If actual insanity in fact supervenes, as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause.** In the early cases of *Burrows* (1823) and *Renmie* (1825) (*d*), Mr. Justice Holroyd refused to regard drunkenness as an excuse unless it had induced a continuing and lasting condition of insanity. But in *R.* v. *Davis* (*e*), where the prisoner was charged with wounding with intent to murder, Mr. Justice Stephen thought (and I agree with him) that insanity, even though temporary, was an answer. The defence was that the prisoner was of unsound mind at the time of the commission of the act, and the evidence established that he was suffering from *delirium tremens* resulting from over-indulgence in drink. Mr. Justice Stephen said: "But drunkenness is one thing and the diseases to which drunkenness leads are different things, and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, as would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case the man is a madman, and is to be treated as such, although his madness is only temporary. . . . If you think there was a distinct disease caused by drinking, but differing from drunkenness and that by reason thereof he did not know that the act was wrong you will find a verdict of not guilty on the ground of insanity. . . ."

(2) That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with

(*c*) [1914] A. C. 534, *ante*, p. 32.
(*d*) 1 Lewin, pp. 75 and 76.
(*e*) 14 Cox C. C. 563.

the other facts proved in order to determine whether or not he had this intent.

(3) That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts.

I now come to *R.* v. *Meade*. . . . The language of the Court of Criminal Appeal (*f*) contains a proposition of law which, regarded as a rule of general application, would mean that a person charged with a crime of violence may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing that what he was doing was dangerous. The Court of Criminal Appeal in the present case, notwithstanding the opinion it had expressed that an act of violence done in furtherance of rape was murder, held that it was bound to follow this doctrine, and that the jury should have been directed to consider whether Beard at the time of placing his hand on the child as described was incapable of knowing that what he was doing was dangerous—that is, likely to cause serious injury.

Your Lordships have had the advantage of a much more elaborate examination of the authorities upon which the rule is founded than was placed before the Court of Criminal Appeal, and, I apprehend, can have no doubt that the proposition in *Meade's Case* in its wider interpretation is not, and cannot be, supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent, but whether he was incapable of foreseeing or measuring the consequences of the act. In this respect the so-called rule differs from the direction of Mr. Justice Coleridge, which is more strictly in accordance with the earlier authorities. Consideration of the

(*f*) *Ante*, p. 39.

judgment, and particularly of Mr. Justice Darling's observations that the Court did not wish to extend the ambit of its decision beyond that laid down in the older cases, makes it clear that it was not intended to lay down a rule which should be applied to such a case as the present. **In *Meade's Case* the crime charged was that death arose from violence done with intent to cause grievous bodily harm. In this case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's Case*, therefore, it was essential to prove the specific intent; in *Beard's Case* it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape.** I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime, *e.g.*, wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the *mens* was *rea*. Drunkenness, rendering a person incapable of the intent, would be an answer, as it is, for example, in a charge of attempted suicide. In *R.* v. *Moore* (*g*), drunkenness was held to negative the intent in such a case, and Chief Justice Jervis said: "If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself?" My Lords, **drunkenness in this case could be no defence unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it, which was not in fact, and manifestly, having regard to the evidence, could not be contended.** For in the present case the death resulted from two acts or from a succession of acts, the rape and the act of violence causing suffocation. These acts cannot be regarded separately and independently of each other. The

(*g*) (1852) 3 C. & K. 319.

capacity of the mind of the prisoner to form the felonious intent which murder involves is, in other words, to be explored in relation to the ravishment; and not in relation merely to the violent acts which gave effect to the ravishment.

Lastly, I come to the actual direction of Mr. Justice Bailhache. It was not a satisfactory direction. The Court of Criminal Appeal held that the learned judge had misdirected the jury because he applied the test of insanity to a case of drunkenness which *a concessis* did not amount to insanity. This distinction, as already shown, has been preserved throughout the cases. And it ought to be so preserved, for the result of a verdict of insanity is not a conviction. That the test suggested by the learned judge is one that would properly be applied in a case of insanity is plain. The questions put: Did the person know what he was doing? or, if not, did he know that he was doing wrong? are in accordance with the opinions expressed by the judges in *McNaghten's Case* (*h*); and, in combination with the question whether the prisoner knew what he was doing, the very ambiguous illustration given by Mr. Justice Bailhache of the meaning that should be attributed to these questions would remove all doubt, if any existed, of the point at which his mind went astray. It is an illustration of a delusion assailing the mind of an insane person, and it is arguable that the impression conveyed to the jury may have been that they could only find a verdict of manslaughter if they found that Beard was the victim of such delusions. As this suggestion had never been made, the effect of such a direction may be made the subject of infinite conjecture. In *Meade's Case* the Court of Criminal Appeal approved Lord Coleridge's direction because he had sufficiently warned the jury that there was no plea of insanity, and that it was not the defence raised. This warning is absent from Mr. Justice Bailhache's direction, and the questions as framed might conceivably (so it is argued) have led the jury to think that insanity was the test. Neither should the learned judge, in my opinion, have introduced the question whether "the prisoner knew that he was doing wrong" in a defence of

(*h*) (1843) 4 St. Trials (N.S.) 849.

drunkenness, where insanity was not pleaded. It is a dangerous and confusing question to put to a jury, for a drunken man's judgment upon such a question is very likely to be impaired, and it might well be perplexing to a jury to determine whether, if he knew what he was doing, he knew also that he was doing wrong. The general proposition that drunkenness is no excuse for crime may be seriously affected in its operation if such a question is to be a test by which the jury may determine whether the verdict should be murder or manslaughter. It is noteworthy that, notwithstanding that the judges ever since *McNaghten's Case* in 1843 have had these questions in mind as the test of insanity, there is no single case, known to me, where drunkenness has been the defence, in which the judge has directed the jury to consider whether the prisoner knew that he was doing wrong. Whenever this question has been put the defence has been that there existed insanity caused by drink. I look upon the direction of Mr. Justice Bailhache as an innovation which is not supported by authority, and which should not be repeated or imitated. But while I think that the summing up was in some respects unhappily conceived, I am not prepared, reading it as a whole, to hold in this case that it amounted to, or should be treated as, a misdirection. The defence which is founded upon insanity is one thing. The defence which is founded upon drunkenness is another. The relevant considerations are not identical. It is inconvenient to use the same language in charging juries in relation to different defences. But the portions of the summing up, which I have criticised, were in fact unduly favourable to the prisoner. He cannot complain of them unless they so confused the jury as to prevent it from properly appreciating the true issue, and I am not prepared to lay it down—though I have felt some doubt upon the point—that the actual direction given to the jury by Mr. Justice Bailhache disabled them from reaching a true conclusion upon the matters which required decision. On the contrary, I think that, upon the whole, the matter was so presented to them, though unscientifically, that they have in fact formulated the answer which is decisive even in a case where the defence is founded upon drunkenness.

In the present case I doubt, without reaching a conclusion, whether there was any sufficient evidence to go to the jury that the prisoner was, in the only relevant sense, drunk at all. **There was certainly no evidence that he was too drunk to form the intent of committing rape. In these circumstances, it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing is by the law of England murder.** I am, therefore, of opinion that the appeal should be allowed and the conviction of murder restored, and I move your Lordships accordingly.

16.

R. v. GORRIE.

(1918) 83 J. P. 136.

A boy aged thirteen, playing with other boys, slightly wounded one of them with a penknife and caused his death through septic pyæmia. He was charged with manslaughter, and the defence was that the wound was accidental, or, alternatively, that as he was presumed to be *doli incapax*, such presumption could only be rebutted by strong evidence of mischievous discretion, and that the evidence was to the contrary.

Salter, J., in summing up, said that the defendant was under fourteen years of age. In the case of persons under fourteen years of age, the law presumed that they were not criminally responsible; they were not supposed to have that discretion which should make them criminally responsible. But in any particular case, if the prosecution could show that although the accused was under fourteen the act was done with what was called mischievous discretion, then they could rebut the presumption that the child was not responsible. Therefore the jury should first of all consider whether it would be their duty to find him guilty if he were over fourteen, and then consider whether mischievous discretion deprived him of the shelter which he would otherwise have. . . . The boy was under fourteen, and the law presumed that he was not responsible criminally; and if the prosecution sought to show that he

was responsible although under fourteen, they must give them very clear and complete evidence of what was called mischievous discretion; that meant that they must satisfy the jury that when the boy did this he knew that he was doing what was wrong—not merely what was wrong, but what was gravely wrong, seriously wrong. It was for the jury to say whether there was any evidence that this boy, when, as was alleged, he "jabbed" the other with the knife in this horse-play, had any consciousness that he was doing that which was gravely wrong.

The jury found Gorrie not guilty, and he was discharged.

17.

R. v. TYLER AND PRICE.

(1838) 8 C. & P. 616.

An insane person, called John Thom, collected a number of persons, who armed themselves for the purpose of resisting the lawfully constituted authorities. Thom, in the presence of Tyler and Price, two of the members of his party, shot an assistant of a constable who came to apprehend him under a warrant. *Held*, that Tyler and Price were guilty of murder as principals in the first degree, and that any fear which they had of personal danger to themselves from Thom was no defence for continuing with him after he had declared his purpose.

Lord Denman, C. J. (in summing up).—In order to make out that part of the charge which imputes to Thom the act of murder and that these persons were guilty of aiding and abetting him to commit the murder, it would be necessary to show that Thom was a person capable of committing that murder. In order to make out the malicious intention imputed in the indictment to the act of Thom, he must be shown to have been of sound mind at the time when he committed it, for it is a maxim of law, that persons not of sound mind cannot be held responsible for their acts. It seems to me, therefore, that if it appears in evidence that Thom was not, at the time of committing the act, of sound mind, you must acquit the prisoners upon the first count of the indictment, for

there will be no foundation on which the accessory crime can rest. I must own, that the impression on my mind is, that Thom was a man of unsound mind. I think, too, that if he was now before us on his trial, you could not safely say that he was in a condition to be answerable for his acts. It is not an opinion which I mean to lay down as a rule of law to be applicable to all cases, that fanaticism is a proof of unsoundness of mind: but there was in this particular instance, so much religious fanaticism—such violent excitement of mind—such great absurdity and extreme folly, that if Thom was now on his trial, it could hardly be said, from the evidence, that he could be called on to answer for his criminal acts; that, therefore, simplifies the question you will have to decide, and confines it to the **second count of the indictment. There these persons are themselves charged with having committed the offence; and if they were aware of the malignant purpose entertained by Thom, and shared in that purpose with him, and were present aiding and abetting, and assisting him in the commission of acts fatal to life, in the course of accomplishing this purpose, then no doubt they are guilty as principals on this second count.** In Hawkins' Pleas of the Crown (*a*), it is said, "where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in so doing, happen to kill a man, they are all guilty of murder; for they must at their peril abide the event of their actions, who wilfully engage in such bold disturbances of the public peace, in open opposition to and defiance of the justice of the nation." **But in all such cases, the fact must appear to have been committed in prosecution of the purpose for which the party assembled.** Here it is argued, that as Thom and his followers are not shown to have had any distinct and definite purpose in view in assembling together, there could not be any general combination for the execution of any such purpose, and the defendants must therefore be acquitted. I think that the evidence will lead you to a very different conclusion. It seems to me wholly

(*a*) Book i., c. 13, s. 51.

unimportant whether the parties had a well-defined and particular mischief to bring about as the result of their combination; because I think if their object was "to resist all opposers in the commission of any breach of the peace," and that for that purpose the parties assembled together and armed themselves with dangerous weapons—in that case it appears to me that however blank might be the mind of Thom as to any ulterior purpose, and however the minds of the prisoners might be unconscious of any particular object, still if they contemplated a resistance to the lawfully constituted authorities of the country, in case any should come against them while they were so banded together, there would be a common purpose, and they would be answerable for anything which they did in the execution of it. **If any man is found aiding another, of whose ill intentions he is thoroughly apprised, he is responsible.** It will be for you to say whether, from what was done by these men both before and after the killing of Nicholas Meares, they did not intend this general resistance to the law. In speaking of malice aforethought it is proper that you should know that that expression does not mean premeditated personal hatred or revenge against the person killed; but it means that kind of unlawful purpose which, if persevered in, must produce mischief, such as if accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be proof of malice prepense. **With regard to the argument you have heard, that these prisoners were induced to join Thom, and to continue with him from a fear of personal violence to themselves, I am bound to tell you, that where parties for such a reason are induced to join a mischievous man, it is not their fear of violence to themselves, which can excuse their conduct to others.** You probably, gentlemen, never saw two men tried at a criminal bar for an offence which they had jointly committed, where one of them had not been to a certain extent in fear of the other, and had not been influenced by that fear in the conduct he pursued: yet that circumstance has never been received by the law as an excuse for his crime, and the law is, that no man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind. You will, therefore,

say whether these two men were so far cognisant of an illegal purpose in Thom, and joined in his acts, that they are guilty of the murder which the hand of Thom committed. You will say whether they were abetting Thom in the blow he gave the deceased; for if they were, the blow of Thom was the blow of them all, and they are answerable for it. **If you think that they kept together with the knowledge of any general purpose of resistance to the law, then they are guilty. It cannot be too often repeated, that the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal.** You will, therefore, discard that as an excuse, and say whether you find that Thom was a dangerous and mischievous person; that these two prisoners knew he was so, and yet kept with him, aiding and abetting him by their presence, and concurring in his acts: and if you do so, you will find them guilty, for they are then liable as principals for what was done by his hand.

Verdict—Not guilty, on the first count; Guilty on the second.

18.

R. v. TYLER.

[1891] 2 Q. B. 588.

Liability of a corporation to criminal proceedings.

Bowen, L.J.—It was first contended on behalf of the appellant that no criminal proceedings can be taken against a company, and it becomes necessary, therefore, in order to make the steps of our reasoning clear, that we should examine that proposition and see if there is anything in it. It would seem contrary to sound sense and reason if such a technical objection could succeed. Where, for instance, a statute creates a duty upon individual persons, it would be a strange result if the duty could be evaded by those persons forming themselves into a joint stock company. The point becomes still more incapable of argument where the statute prescribes the duty in the company itself. How can disobedience to the

enactment by the company be otherwise dealt with? The directors or officers of the company, who are really responsible for the neglect of the company to comply with the statutory requirements, might not be struck at by the statute, and there would be no way of enforcing the law against a disobedient company, unless there were in such cases a remedy by way of indictment. It may, therefore, I think, be taken that where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by means of an indictment. That was laid down in *R.* v. *Birmingham and Gloucester Ry. Co.* (*a*), where Patteson, J., in delivering the judgment of the Court, said that **"as a general proposition . . . a corporation may be indicted for a breach of duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults."** That was a case of nonfeasance; but the same doctrine was applied to cases of misfeasance in *R.* v. *Great North of England Ry. Co.* (*b*), where Lord Denman, who delivered the judgment of the Court, said: "The argument is that for a wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming, in the first place, that there is a plain and obvious distinction between the two species of offence. No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards." And he says that in *R.* v. *Birmingham and Gloucester Ry. Co.*, though a case of nonfeasance only, the Court did not intend to lay down that nonfeasance was the only disobedience to the law for which a corporation was punishable by indictment. The same question was considered

(*a*) 3 Q. B. 323. (*b*) 9 Q. B. 315.

incidentally by Cockburn, C.J., in *Pharmaceutical Society* v. *London Supply Association* (*c*), where he says, "Although it is true that a corporation cannot be indicted for treason or felony, it was established by the case of *R.* v. *Birmingham and Gloucester Ry. Co.*, 3 Q. B. 223, that an incorporated company might be indicted for nonfeasance in omitting to perform a duty imposed by the statute—such as that of making arches to connect lands severed by the defendants' railway. It was further held in *R.* v. *Great North of England Ry. Co.*, 9 Q. B. 315, that an incorporated company could be indicted for misfeasance—as in cutting through and obstructing a highway, though they could not be indicted for treason, or felony, or offences against the person." I take it, therefore, to be clear that in the ordinary case of a duty imposed by statute, if the breach of the statute is a disobedience to the law punishable in the case of a private person by indictment, the offending corporation cannot escape from the consequences which would follow in the case of an individual by showing that they are a corporation. That seems to me to be common sense and good law.

Note.—By s. 27 of the Interpretation Act, 1889, the expression "committed for trial" used in relation to any person shall, unless a contrary intention appears, mean committed to prison with a view to being tried before a Judge and jury. Accordingly, since a limited company cannot in fact be committed to prison, it cannot be committed for trial (*R.* v. *Daily Mirror Newspapers* [1922] 2 K. B. 530).

19.

CHISHOLM v. DOULTON.

(1889) 22 Q. B. D. 736.

A., the owner and occupier of buildings used for the purpose of manufacture, was summoned under s. 1 of the Smoke Nuisance (Metropolis) Act, 1853, for negligently using a furnace so that the smoke was not effectually consumed. The smoke arose entirely through the negligence of the stoker. A. had not been personally guilty of any negligence and had taken care to employ an efficient

(*c*) 4 Q. B. D. 313.

foreman. *Held*, that A. was not personally responsible for the negligence of the stoker.

CAVE, J.—**It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind.** Sometimes it is negligence, sometimes malice, sometimes guilty knowledge—but as a general rule there must be something of that kind which is designated by the expression *mens rea*. **Moreover it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master.** A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on the servant's malice; nor can a master be held liable for the guilt of his servant in receiving goods knowing them to have been stolen. And this principle of the common law applies also to statutory offences with this difference, that it is in the power of the legislature, if it so pleases, to enact, and in some cases it has enacted, that a man may be convicted and punished for an offence although there was no blameworthy condition of mind about him: but inasmuch as to do so is contrary to the general principle of the law, it lies on those who assert that the legislature has so enacted to make it out convincingly by the language of the statute; for we ought not lightly to presume that the legislature intended that A. should be punished for the fault of B.

Now apply those principles to the statute in question. Section 1 enacts that every furnace shall be "constructed or altered so as to consume or burn the smoke arising from such furnace." Then comes the part of the section which affixes penalties for various acts tending to produce the evil against which the legislation is directed. "If any person shall . . . use any furnace which shall not be constructed so as to consume or burn its own smoke." Now there no condition of mind is required as an element in the offence; and we ought to hold with regard to that offence that the owner of the works, although not cognisant that his furnace is incapable of consuming its own smoke, is liable to be convicted if it in fact is so; for it is expressly enacted that if he uses a furnace not

properly constructed he shall be liable to the penalty, and he certainly may use it by his servants. Then, passing over the middle clause for a moment, another part of the section enacts that if any person "shall carry on any trade or business which shall occasion any noxious or offensive effluvia, or otherwise annoy the neighbours or inhabitants, without using the best practical means for preventing or counteracting such smoke or other annoyance" he shall be liable. There, again, a *mens rea* is not essential to the commission of the offence, the owner of the premises is absolutely liable if the trade is carried on in such a manner. Now go back to the clause under which the respondent has been summoned, "or shall so negligently use any such furnace as that the smoke arising therefrom shall not be effectually consumed." This differs from the other clauses in that it introduces the word "negligently," a word which imports a blameable condition of mind. If that word were not there, the owner would be responsible for the use of the furnace in such a way that the smoke was not consumed although the use was by his servants and not personally by himself. **But the legislature has chosen to make negligence an essential ingredient in this particular offence.** And, although the decisions under the Licensing Acts have established that, where a statute has expressly prohibited the doing of something without reference to the condition of mind of the party doing it, it may under certain circumstances, and having regard to the object of the statute, be reasonable to infer that the legislature intended that the master should be responsible if his servant disobeyed the prohibition, yet **so far as I know no statute has ever yet been judicially interpreted as enacting, that where negligence is an essential ingredient in the offence a master is to be responsible for the negligence of his servant.**

20.

COPPEN v. MOORE (No. 2).

[1898] 2 Q. B. 306.

By s. 2 (2) of the Merchandise Marks Act, 1887, it is an offence to sell goods to which a false trade description has been applied. A. was a grocer carrying on business at a number of shops, to each of which he had sent a notice that hams were to be sold as "breakfast" hams, not as "Bristol," "Scotch," "Wiltshire," or with any similar description. An assistant nevertheless sold an American ham as a Scotch ham. *Held*, that A. was criminally liable for the act of his assistant.

Lord Russell, C.J.—The appellant's contention was that the charge here preferred was a criminal charge, and that the general principle of law applied *Nemo reus est nisi mens sit rea*. There is no doubt that this is the general rule, but it is subject to exceptions and the question here is whether the present case falls within the rule or within the exception. Apart from statute exceptions have been grafted upon the rule . . . by far the greater number of exceptions engrafted upon the general rule are cases in which it has been decided that by various statutes criminal responsibility has been put upon masters for the acts of their servants. Amongst such cases is *Mullins* v. *Collins* (*a*), where a licensed victualler was convicted of an offence under s. 16 of the Licensing Act, 1872, for supplying liquor to a constable on duty, although this was done by his servant without the knowledge of the master. Again, in *Bond* v. *Evans* (*b*), a licensed victualler was convicted of an offence against s. 17 of the same Act, where gaming had been allowed in the licensed premises by the servant in charge of the premises, although without the knowledge of his master. The decisions in these and in other like cases were based upon the construction of the statute in question. **The Court in fact came to the conclusion that, having regard to the language, scope, and object of those Acts, the legislature intended to fix responsibility upon the master for acts done by his servant in the course of his employment,**

(*a*) L. R. 9 Q. B. 292. (*b*) 21 Q. B. D. 249.

although such acts were not authorized by the master, and might even have been expressly prohibited by him.

The question, then, in this case, comes to be narrowed to the simple point, whether upon the true construction of the statute here in question the master was intended to be made criminally responsible for acts done by his servants in contravention of the Act, where such acts were done, as in this case, within the scope or in the course of their employment. In our judgment it was clearly the intention of the Legislature to make the master criminally liable for such acts, unless he was able to rebut the *primâ facie* presumption of guilt by one or other of the methods pointed out in the Act . . . (*c*).

When the scope and object of the Act are borne in mind, any other conclusion would to a large extent render the Act ineffective for its avowed purposes. The circumstances of the present case afford a convenient illustration of this. The appellant, under the style of the "London Supply Stores," carries on an extensive business as grocer and provision dealer, having, it appears, six shops or branch establishments, and having also a wholesale warehouse. It is obvious that, if sales with false trade descriptions could be carried out in these establishments with impunity so far as the principal is concerned, the Act would to a large extent be nugatory.

Note.—To this and the preceding case may be added the following extract from the judgment of Atkin, J., in *Monsell Brothers* v. *L. & N. W. Railway* [1917] 2 K. B., at p. 845: "I think that the authorities . . . make it plain that while *primâ facie* a principal is not to be made criminally responsible for the acts of his servants yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not, regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

(*c*) By sub-s. 2 (*c*) the defendant might have successfully met the *primâ facie* case against him by showing that he had acted innocently, but this defence was not raised.

21.

R. v. LINNEKER.

[1906] 2 K. B. 99 (C. C. R.).

L. was indicted under s. 18 of the Offences against the Person Act, 1861, for attempting to discharge a loaded revolver at the prosecutor with intent to do him grievous bodily harm. L. had drawn a loaded revolver completely out of his pocket, but his arm had been seized by the prosecutor before he could take any aim. While the prisoner and the prosecutor were struggling the former said several times, "You've got to die." *Held*, that there was evidence of an attempt within s. 18.

KENNEDY, J.—I think that there was sufficient evidence to leave to the jury on the question whether there was an attempt on the part of the prisoner to discharge the revolver. It is, however, important to bear in mind that in cases under this section there must be evidence both of an attempt to discharge the weapon and of an intent to do grievous bodily harm, and, **although an attempt implies the intent, an intent does not necessarily imply an attempt.** There may be cases which are very near the line as regards the attempt, although there is no doubt as to the intent. It is always necessary that **the attempt should be evidenced by some overt act forming part of a series of acts which, if not interrupted, would end in the commission of the actual offence.**

DARLING, J.—The statute deals in both s. 14 and s. 18 with two matters which have to be present in every case to constitute the crime. First, there must be evidence of the physical act, the attempt to discharge the firearm. That can be proved by evidence of what the man was doing with his hands, holding a pistol and so on; and if he did those acts which, if not prevented, he would do in order to discharge a pistol, then there is evidence of an attempt. In the case before us the prisoner pulled a loaded revolver out of his pocket and struggled with the prosecutor, attempting to free his arm, which the prosecutor had caught hold of. I think that those facts are evidence of an attempt to discharge the revolver. But the offence under ss. 14 and 18 is not complete unless

there was an intent in the one case to murder, and in the other to do grievous bodily harm. In some of the cases there has been a difficulty as to what constitutes **evidence of intent,** but there is none here, because **the prisoner told the prosecutor that he had got to die.**

WALTON, J.—The question is, was there any evidence of an attempt by the prisoner to discharge the revolver? It is clear that **all acts done for the purpose of committing a crime are not attempts, for they may be merely acts of preparation;** but, applying the definition of an attempt given in Stephen's "Digest of the Criminal Law," art. 49 (*a*), I am clearly of opinion that there was in this case evidence of an attempt.

22.

R. v. WHITE.

[1910] 2 K. B. 124.

Mrs. White was found dead in her house; by her side was a glass of lemonade containing cyanide of potassium. She had not, however, died from any poison nor had the lemonade contained enough poison to kill her. The prisoner, her son, had purchased cyanide of potassium, and there was evidence from which a jury could infer that he had put into the lemonade the quantity found there and with intent to murder the deceased. *Held,* that he was properly convicted of an attempt to murder.

Judgment of the Court of Criminal Appeal, delivered by:

BRAY, J.—The next point made was that if he put it there with that intent there was no attempt at murder; that the jury must have acted upon a suggestion of the learned judge in his summing up that this was one, the first or some later of a series of doses which he intended to administer and so cause her death by slow poisoning; and if they did act on that suggestion there was no attempt at murder, because the act of which he was guilty, namely, the putting the poison in the

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(*a*) "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted."

wine glass, was a completed act and could not be and was not intended by the appellant to have the effect of killing her at once. It could not kill unless it were followed by other acts which he might never have done. There seems no doubt that the learned judge in effect did tell the jury that if this was a case of slow poisoning the appellant would be guilty of the attempt to murder. We are of opinion that this direction was right and that **the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by the other acts, result in killing. It might be the beginning of the attempt,** but would none the less be an attempt. While saying this we must say also that we do not think it likely the jury acted on this suggestion, because there was nothing to show that the administration of small doses of cyanide of potassium would have a cumulative effect; we think it much more likely, having regard to the . . . [evidence] . . . that the appellant supposed he had put sufficient poison in the glass to kill her. This, of course, would be an attempt to murder.

23.

R. v. HARRY ROBINSON.

(1915) 84 L. J. K. B. 1149.

Attempt. [The facts appear from the judgment.]

Judgment of the Court of Criminal Appeal delivered by Lord Reading, C.J.—The appellant was convicted of attempting to obtain some £1,200 from Lloyd's underwriters and sentenced to six months' imprisonment. The question we have to decide is one of law depending on the facts. There are, however, few facts in dispute. The appellant is a jeweller carrying on business at Oldham. He insured his stock against burglary, and received the policy of insurance which would cover any loss sustained by him. On December 11 last a

police sergeant passing the appellant's premises heard the noise of someone crying out. He effected an entrance through the doorway, and found the appellant bound to a chair with his neck and wrists tied with string. Upon making enquiry of the appellant he was informed that his jewellery, of the value of £1,500, had been locked up in the safe, and that on going upstairs he had been knocked on the head by some intruder. The sergeant found the safe open, and the jewellery missing. He was not satisfied with the account given by the appellant, and took him to the police station. Afterwards the police entered the premises and found all the jewellery secreted near the safe. The appellant was questioned, and admitted that, having sustained serious loss through the present war, and remembering a previous robbery which had taken place on his premises, he devised the scheme for obtaining some more money. He did not, and could not, dispute the fraudulent device, and that the object which he had in view in the future was to obtain the moneys under the policy from the underwriters. The only question we have to decide is whether, whatever the intention of the appellant might be, the police sergeant having entered at the particular moment and found the appellant in the condition I have described, and before any other steps had been taken by him in the execution of his scheme, the offence of attempting to obtain money by false pretences was complete. There is no doubt that, if he had made a claim to the underwriters for the moneys payable under the policy by reason of a burglary and robbery which he said had happened, or had taken any step to communicate with the underwriters with the object of claiming the money, the offence for which he was indicted would be complete; but in this case the point was taken at the trial that the evidence was not sufficient to show that an attempt to commit the offence was complete, but only amounted to a preparation for its commission. The learned Judge who presided at the trial did not accept this view, but held that there was sufficient evidence to go to the jury, and the appellant was convicted.

It appears to us, on a consideration of the authorities which have been cited, that there is no difficulty in formulating a rule applicable to cases of this kind. The first guide for our

assistance is to be found in the case of *R.* v. *Eagleton* (*a*), where Baron Parke says: "**The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think all acts towards committing a misdemeanour indictable. Acts remotely leading to the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are; . . .**" In order to determine whether a particular case comes within the rule there laid down, it is, no doubt, sometimes very difficult to draw the line. In each of the cases of *Reg.* v. *Roberts* (*b*) and *Reg.* v. *Button* (*c*), there was undoubtedly a false pretence made, and also an attempt to induce the authorities to act upon such pretence, and, although the attempt failed, it was held that an attempt to commit the offence charged had been proved. Now in this case the real difficulty consists in this, that there is no evidence that anything done by the appellant ever reached the ears of the underwriters. They were the persons whose minds must be induced to part with the moneys payable under the policy; they were the persons from whom the money was to be obtained. It cannot be said that the police sergeant was acting as agent for the underwriters; he was merely acting in the course of his official duty. **In truth, what the appellant did was merely a preparation for the commission of a crime, and not a step immediately connected with the crime.** It was the preparation of evidence which established a false pretence if it had led the underwriters to pay the moneys under the policy. If the police had not obtained the further information as they did, it might have been sufficient to cause payment to be made to the appellant. **There must, however, be some further act on the part of the appellant before it can be said that the attempt to commit the offence for which he has been indicted is complete. Applying the test laid down by Baron Parke, we come to the conclusion that, in order to constitute an attempt to commit the offence, the act relied on must be an act directly connected with the commission of the complete offence.** If we were

(*a*) 24 L. J. M. C. 158, 166; Dears. C. C. 515, 538.
(*b*) 25 L. J. M. C. 17; Dears. C. C. 539.
(*c*) 69 L. J. Q. B. 901; [1901] 2 Q. B. 597.

to decide otherwise, we should be going very much further than any other case has previously gone, as it would be holding that a mere preparation to commit an offence constitutes an attempt to commit that offence. **For these reasons we are of opinion that the appellant has not been guilty of the attempt to obtain money by false pretences from the underwriters, and therefore the conviction cannot be upheld.** We decide this case by applying the above test to the facts of the case on the ground stated by Baron Parke, and because there was no connecting link of any kind between the appellant and the underwriters. For these reasons we are of opinion that the conviction must be quashed.

24.

R. v. MICHAEL.

(1840) 9 C. & P. 356.

The prisoner was indicted for the murder of her infant child. The child was in the care of a woman named Stevens, to whom the prisoner had given a bottle of laudanum, telling her it was a medicine which would do the child good, and asking her to give it a tea-spoonful every night. The woman did not give the child any of the contents of the bottle, but put it on her mantelpiece, and in her absence one of her own children gave the prisoner's child about half the contents of the bottle, causing its death. *Held*, that the prisoner was rightly convicted of murder.

Alderson B., in his summing up, told the jury that if the prisoner delivered the laudanum to Sarah Stevens with the intention that she should administer it to the child, and thereby produce its death, and the quantity so directed to be administered was sufficient to cause death, and while the prisoner's original intention continued, the laudanum was administered by an **unconscious agent,** the death of the child, under such circumstances, would sustain the charge of murder against the prisoner.

The jury found the prisoner guilty. The judgment was respited that the opinion of the judges might be taken, whether

the facts above stated constituted an administering of the poison by the prisoner to the deceased child.

At a subsequent session ALDERSON, B., in passing sentence upon the prisoner, said that the judges were of opinion that the administering of the poison by the child of Mrs. Stevens was, under the circumstances of the case, as much, in point of law, an administering by the prisoner as if the prisoner had actually administered it with her own hand. They therefore held that she was rightly convicted.

Note.—In the case of *R.* v. *Bleasdale* (1849) 2 C. & K., at p. 268, the general rule was thus expressed by Erle, J.: "If a man does, by means of an innocent agent, an act which amounts to a felony, the employer, and not the innocent agent, is the person accountable for that act." In such a case, accordingly, the employer, *though absent when the act is done,* is liable as a principal. But if the agent is aware of the nature and consequences of the act he is a principal in the first degree, and the employer, if absent when the act is committed, is liable as an accessory before the act (see *R.* v. *Manley,* 1 Cox, 104).

25.

R. v. CONEY AND OTHERS.

(1882) 8 Q. B. D. 534 (C. C. R.).

Two men had engaged in a prize-fight near the road from Ascot to Maidenhead. A ring was formed with posts and ropes and a large crowd was present encouraging the fighters. In the crowd were Coney and two friends; there was no evidence that they did or said anything or how they came to be in the crowd. They were tried and convicted of assault, as principals in the second degree. *Held,* that the mere voluntary presence at the fight of Coney and his friends did not necessarily render them guilty of an assault as aiding and abetting in such fight.

HAWKINS, J.—Two questions were argued before us. First, whether the combatants themselves were guilty of assaults upon each other? and, secondly, whether the defendants were aiders and abettors in the fight and therefore also rightly convicted?

Upon the first question, the defendants' counsel contended that each of the combatants having assented to the fight,

neither could be convicted of an assault upon the other. To this contention I cannot give my sanction. As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of assent is an essential element in every assault, and that which is done by consent is no assault at all: *Christopherson* v. *Bare* (*a*), *R.* v. *Guthrie* (*b*), and numerous other cases. It may be that consent can in all cases be given so as to operate as a bar to a civil action; upon the ground that no man can claim damages for an act to which he himself was an assenting party . . . . It is not necessary, however, upon the present occasion to express any decided opinion upon the point; for whatever may be the effect of a consent in a suit between party and party, **it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution.** In other words, though a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public for the maintenance of good order: *per* Burrough, J., in *R.* v. *Bellingham* (*c*). **He may compromise his own civil rights but he cannot compromise the public interests.**

Nothing can be clearer to my mind than that every fight in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize-fight for money or other advantage. In each case the object is the same, and in each case some amount of personal injury to one or both of the combatants is a probable consequence, and, although a prize-fight may not commence in anger, it is unquestionably calculated to rouse the angry feelings of both before its conclusion. I have no doubt, then, that every such fight is illegal and the parties to it may be prosecuted for assaults upon each other. Many

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(*a*) 11 Q. B. 473. (*b*) L. R. 1 C. C. R. 241. (*c*) 2 C. & P. 234.

authorities support this view. In *R.* v. *Ward* (*d*) the prisoner was tried for the slaughter of a man whom he had killed in a fight to which he had been challenged by the deceased for a public trial of skill in boxing. No unfairness was suggested, and yet it was held that the prisoner was properly convicted. To the same effect is the case of *R.* v. *Lewis* (*e*) in which Coleridge, J., said, "When two persons go out to strike each other, each is guilty of an assault." . . .

The cases in which it has been held that persons may lawfully engage in friendly encounters not calculated to produce real injury to or to arouse angry passions in either, do not in the least militate against the view I have expressed; for such encounters are neither breaches of the peace nor are they calculated to be productive thereof, but if, under colour of a friendly encounter, the parties enter upon it with, or in the course of it form, the intention to conquer each other by violence calculated to produce mischief, regardless whether hurt be occasioned or not, as, for instance, if two men, pretending to engage in an amicable spar with gloves really have for their object the intention to beat each other until one of them be exhausted and subdued by force, and so engage in a conflict likely to end in a breach of the peace, each is liable to be prosecuted for an assault: *R.* v. *Orton* (*f*). Whether an encounter be of the character I have just referred to, or a mere friendly game having no tendency, if fairly played, to produce any breach of the peace, is always a question for the jury in case of an indictment, or the magistrates in case of summary proceedings. . . .

Upon the ruling of the chairman as to the illegality of the fight, I entertain therefore no manner of doubt, and I am clearly of opinion that the combatants themselves were each guilty of an assault upon the other. Nor do I entertain any doubt that all who were present aiding or abetting the fight were liable to be indicted as principals to it, for by 24 & 25 Vict. c. 94, s. 8, "Whoever shall aid, abet, counsel, or procure the commission of a misdemeanor shall be tried, etc., as a principal." Whether the defendants were rightly con-

(*d*) 1 East P. C. 270. (*e*) 1 C. & K. 419. (*f*) 39 L. T. 293.

victed as aiders and abettors, is a different matter. I am of opinion they were not.

In summing up the case the chairman directed the jury that all persons who went to a prize-fight to see the combatants strike each other, and who were present when they did so, were, in point of law, guilty of an assault, for "if they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not do or say anything." The jury, on that direction, found the defendants guilty, but they also found expressly that they were not aiding or abetting. The whole question, therefore, for us to determine, as a matter of law, is not whether voluntary presence at a prize-fight is evidence of an aiding and abetting, but whether inactive presence at a prize-fight as a voluntary spectator thereof, amounts of itself to such encouragement of it as to render a man amenable to the criminal law as an aider and abettor in that breach of the peace. . . .

In my opinion, **to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal or principals.** Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. *But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted.* But it would be purely a question for the jury whether he did so or not. So if any number of persons arrange that a criminal offence shall take place, and it takes place accordingly, the mere presence of any of those who

so arranged it would afford abundant evidence for the consideration of a jury of an aiding or abetting. A very strong authority upon this point is to be found in the case of *R.* v. *Borthwick* (*g*). That was an indictment for murder charging the prisoners as principals in the second degree. Willes, J., citing *Messenger's Case* from Kelynge's Reports, said: "Where several acts of force are found to have been actually committed in pursuance of the design" (that is a common illegal design) "there is no need to find the prisoners to have been aiding and assisting, for that is only necessary to be found where the jury find a person was there amongst them, and find no particular act of force done by him, but only in his presence. In the present case it is not found that the prisoners did any act during the affray, or that they were present aiding and assisting; and the Court cannot intend that they were." In *R.* v. *Young* (*h*) which was an indictment for murder (in a duel between Elliot and Mirfin) against the prisoners as principals in the second degree Vaughan, J., in addressing the jury said "mere presence alone will not be sufficient to make a party an aider and abettor; but **it is essential that he should by his countenance and conduct in the proceeding, being present, aid and assist the principals."** "Did the prisoners give their aid and assistance by their countenance and encouragement of the principals in this contest? It is said one of the prisoners went for the purpose of bringing about a reconciliation, not to give countenance to the continuance of the contest, that is for you . . ."

In *R.* v. *Atkinson* (*i*) Kelly, C.B., on the trial of the defendants for a riot, expressly ruled "that the mere presence of a person among the rioters, even though he possessed the power, and failed to exercise it, of stopping the riot, did not render him liable on such a charge." And he left the case to the jury with this direction "that in order to find any of the defendants guilty the jury must be satisfied that they had taken part in an assembly for an unlawful purpose, and had **helped, or encouraged, or incited** the others in the prosecution of that purpose."

(*g*) 1 Doug. 247.
(*h*) 8 C. & P. 644.
(*i*) 11 Cox C. C. 322.

26.

R. v. TAYLOR.

(1875) L. R. 2 C. C. R. 147.

A. and B. quarrelled and agreed to fight. Each of them put down £1 so that £2 should be paid to the winner, T. agreed to hold the £2 as stakeholder, but he did not in any way encourage the fight, nor was he present. A. and B. having fought, A. received injuries of which he died. *Held*, that T. was not an accessory before the fact to the manslaughter of A.

COCKBURN, C.J.—The indictment was for abetting a manslaughter. The facts were that the manslaughter occurred in the course of a fight. The accused was not present at the fight and all he had to do with it was that he had consented to hold £2 which the men about to fight deposited by way of binding themselves to fight, and to be given to the winner. It appears to me that to support an indictment against a man as an accessory by abetting an offence, **there must be some sort of active proceeding on his part.** He must incite, or procure, or encourage the act. At first I was struck with the view that the stakes were something essential to the fight, and that the prisoner by holding the stakes might be said to participate in the fight. But I do not think the mere consent to hold the stakes can be said to amount to such a participation as is necessary to support the conviction.

The question suggested by my Brother Mellor, whether there can be an accessory before the fact to a manslaughter of this nature, is one of great difficulty, and it is not necessary to decide it in the present case.

BRAMWELL, J.—The question is whether there has been an abetting. I think that there has not. **Nothing that the accused did assisted or enabled the fight to take place.**

MELLOR, J.—We need not settle the question to which I called attention during the argument. For there is no evidence that the accused engaged the two men to fight or assisted or counselled them to it.

27.

R. v. LEVY.

(1912) 81 L. J. K. B. 264.

A. was charged, as an accessory after the fact, with feloniously receiving, harbouring and maintaining B., who was charged with the felonious possession of a mould for coining counterfeit money. A., shortly before B.'s arrest, had removed from B.'s workshop a number of fragments of other coining moulds, which were produced in evidence against B. The jury were charged that if they were satisfied that A. removed these things knowing that he was guilty of the felony with which he was charged and did so for the purpose of assisting him to escape conviction, they should find her guilty. *Held*, that the indictment properly charged A. as an accessory after the fact, and that the conviction was right.

Judgment of the Court of Criminal Appeal delivered by:

Lord Alverstone, C.J.—In the opinion of the Court this appeal must be dismissed. The appellant was indicted as an accessory after the fact, and the particular count alleged that she did "feloniously receive, harbour, and maintain" the principal felon. It is not disputed that for a great many years that has been the usual form of describing an accessory after the fact; and it seems to the Court that if the word "harbour" may be said to have a somewhat narrow meaning, the word "receive"—and possibly also the word "maintain"— has acquired a secondary meaning. Having regard to the case of *Reg.* v. *Butterfield* (*a*), and to the passage in Hawkins' "Pleas of the Crown," it appears to us that we have to say what is the test of a person being an accessory after the fact. In Hawkins' "Pleas of the Crown," bk. 2, c. 29, s. 25, it is said: **"What kind of receipt of a felon will make the receiver an accessory after the fact?"** There the words "receipt of a felon" are used, indicating what the meaning of "receipt" was. Hawkins then goes on in section 26: **"It seems agreed that, generally, any assistance whatever given to one known to be a felon, in order to hinder his being apprehended or tried,**

(*a*) 1 Cox C. C. 39.

or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose." That was quoted in argument in *Reg.* v. *Butterfield* (*a*), and Maule, J., in that case said this: "I think there is evidence of comforting and assisting, which would make the prisoner an accessory after the fact. If a man stole a horse, and another assisted him in colouring and disguising him, so that he could not be known again, this would make him an accessory. Here the prisoner assists the party who has stolen the goods to get rid of them, and thus evade the justice of the country." In Stephen's "Digest of the Criminal Law," art. 46, it is said that "every one is an accessory after the fact to felony who, knowing a felony to have been committed by another, receives, comforts, or assists him, in order to enable him to escape from punishment; or rescues him from an arrest for the felony; or having him in custody for the felony, intentionally and voluntarily suffers him to escape; or opposes his apprehension." In our opinion this count properly describes the appellant as an accessory after the fact, and the Common Serjeant properly directed the jury that if they were satisfied that the appellant removed the things from Green's workshop knowing that he was guilty of having committed a felony, and did so for the purpose of assisting him to escape conviction, they should find her guilty. The Common Serjeant there used the word "assisting" in the same way as that word is used in Hawkins' "Pleas of the Crown." Whether it would be desirable also to insert the word "assist" in the indictment, it is unnecessary to consider. In our opinion this indictment properly charged the appellant with being an accessory after the fact, and she was proved to be such an accessory. On this case stated, therefore, there must be judgment for the Crown.

(*a*) 1 Cox C. C. 39.

28.

GOULD & CO. v. HOUGHTON.

(1921) 90 L. J. K. B. 369.

The appellants were charged with aiding and abetting G. in the misdemeanour of selling an article of food, bought for test purposes, not of the nature, substance and quality demanded. By s. 19 of the Sale of Food and Drugs Act, 1899, any prosecution for this offence shall not be instituted after the expiration of 28 days from the time of the purchase. *Held*, that the appellants, as aiders and abettors in a misdemeanour, were themselves principals for the purposes of conviction, and were therefore entitled to the benefit of this section.

The Earl of Reading, C.J., read the following judgment: On April 12, 1920, proceedings were instituted by the respondent Houghton, an inspector under the Food and Drugs Acts, against Arthur Frank Gore, for having on March 24, 1920, sold an article of food which was adulterated contrary to the provisions of s. 6 of the Sale of Food and Drugs Act, 1875. Houghton had purchased the article from Gore for test purposes. Upon the hearing of the summons on April 29, 1920, Gore pleaded guilty.

On May 6, 1920, proceedings were instituted against H. Gould & Co., the appellants, for that they did "unlawfully aid, abet, counsel and procure Arthur Frank Gore" in the commission of the said offence on March 24, 1920. On May 13, 1920, the date returnable for the hearing of the summons, the appellants took objection that the proceedings against them were out of time by virtue of s. 19 of the Sale of Food and Drugs Act, 1899. [His Lordship read sub-s. 1 of s. 19, and continued:] The proceedings against the appellants were instituted after the expiration of twenty-eight days from the time of the purchase, and the appellants therefore claimed that the summons should be dismissed. On behalf of Houghton, the respondent, it was contended that the proceedings against the appellants were not proceedings to which this section applied, but were proceedings instituted under s. 5 of the Summary Jurisdiction Act, 1848. [His Lordship read the material words of the section, and con-

tinued:] The justices were of opinion that the prosecution was instituted under s. 5 of the Summary Jurisdiction Act, 1848, and that consequently s. 19 of the Sale of Food and Drugs Act, 1899, had no application to these proceedings. They upheld the respondent's contention, but stated a case for the opinion of this Court before proceeding further with the hearing.

The facts have not yet been ascertained, and it has not been established that the appellants did participate in the offence committed by Gore, but in the arguments before this Court it has been assumed that evidence would be available to prove that the appellants aided and abetted, counselled or procured, the commission of the offence by Gore. It is not, however, suggested that the appellants were in any sense present when Gore committed the offence; therefore the part taken by the appellants would be that of accessories to or before the fact, and not that of principals in the second degree; and it cannot be disputed that in misdemeanours (and treason) all who take part in the offence may be proceeded against as principals. Misdemeanour in this connection is not limited to indictable misdemeanours, for guilty participation in any offence punishable by summary conviction is a misdemeanour within this principle of law—*Du Cros* v. *Lambourne* (*a*). It is admitted at the bar that the appellants could have been lawfully prosecuted as principals either together with Gore or before or after Gore's conviction by virtue of the Summary Jurisdiction Act, 1848, s. 5, and the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 8, and I would add, under the common law, for the statutes are in this respect declaratory of the common law—Lord Alverstone, C.J., in *Du Cros* v. *Lambourne* (*b*). If the appellants had been convicted with Gore, or otherwise as principals, they, equally with Gore, would have been entitled to the protection of the twenty-eight days' limitation of time under section 19 of the Sale of Food and Drugs Act, 1899. So far no difficulty arises, but it is contended that this section has no application to proceedings against the appellants for having committed a misdemeanour

(*a*) 76 L. J. K. B. 50. (*b*) 76 L. J. K. B. at p. 53.

at common law, namely, aiding, abetting, counselling, or procuring Gore to commit an offence under s. 6 of the Sale of Food and Drugs Act, 1875. It is, therefore, contended that this limitation of time has no application to the present case, and that these proceedings could be instituted within six calendar months from the time when the complaint arose —Summary Jurisdiction Act, 1848, s. 11.

No authority can be cited for this proposition and in my judgment it is unsound. The contention is that although the twenty-eight days' limitation of time would be a fatal objection if the appellants were charged as principals, it has no application to the present proceedings because the appellants are charged with aiding and abetting, counselling and procuring. That means that upon precisely the same evidence the appellants would be entitled to the benefit of the twenty-eight day's limitation of time if they were charged in the summons as principals, but would lose the benefit of it if they were charged as aiders, abettors, counsellors or procurers. This result would, in my judgment, be contrary to the common law and the statute law. **The authorities show conclusively that whatever the language used to denote the specific offence charged, or the part taken by the accused in the misdemeanour, the true principle of law is that expressed by Willes, J., in** *Stacey* v. *Whitehurst* (*c*): **"In cases of treason, and in offences which are less than felony, every one who in cases of felony would be a principal in the second degree, or an accessory, is a principal"; that is, as I understand it, that although in fact the accused has not committed the misdemeanour but has only aided, abetted or counselled or procured its commission yet he is to be treated in law as if he had taken the same part as the active perpetrator of the facts constituting the offence. . . .**

In recent years this principle of law has been several times considered by the King's Bench Division. In *Reg.* v. *Waudby* Lord Russell of Killowen, C.J., said (*d*): "Where a person is charged with aiding and abetting, if he is found guilty of aiding and abetting a misdemeanour, he is guilty as a prin-

(*c*) 18 C. B. (N.S.) at p. 355. (*d*) 64 L. J. M. C. at p. 252.

cipal, for there are no degrees of guilt in misdemeanour," and held that, there being no secondary guilt in misdemeanour, the prisoner was a principal offender. All the members of the Court concurred.

Du Cros v. *Lambourne* is a direct authority of this Court for the proposition that a person who has aided and abetted the commission of an offence punishable on summary conviction may, under s. 5 of the Summary Jurisdiction Act, 1848, be convicted on an information which charges him with having committed the offence as principal offender. Lord Alverstone, C.J., said (*e*): "It is important . . . to bear in mind that in the case of crimes other than felonies there is no distinction between a principal offender and aiders and abettors . . . there is no such person as an accessory in point of law in a misdemeanour. . . ." And further on: "Keeping in view the fundamental distinction between felonies and misdemeanours and the impossibility of there being in the case of misdemeanours accessories or aiders and abettors as distinct from principals, one finds that s. 5 of the Act of 1848 provides that a person aiding and abetting may be charged with the principal offender and is liable to the same punishment." Ridley, J., and Darling, J., agreed. In a later case, *Rex* v. *De Marney* (*f*), Lord Alverstone, in a Court of five Judges, again affirmed the proposition that in misdemeanours persons who aid and abet, counsel or procure the commission of an offence are themselves principal offenders. The other four Judges concurred in his opinion and the reasons for this decision.

From these authorities, it is, in my judgment, conclusively established that an accessory before the fact to the commission of a misdemeanour is to be regarded in law for the purpose of conviction as a principal offender. No doubt the terms "accessory" and "principal in the second degree" are sometimes used in reference to cases of misdemeanour, but they are so used for the convenient purpose of compendious reference and to distinguish between the actual perpetrator of the facts, often called the principal offender, and other

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(*e*) 76 L. J. K. B. at p. 53. (*f*) 76 L. J. K. B. 210.

participators in the misdemeanour who take part by aiding and abetting or counselling or procuring the commission of the offence. Again when considering the sentence to be imposed these are convenient expressions to distinguish between the degrees of actual participation by the various offenders, but for the purposes of conviction in misdemeanours the law is that all are to be regarded as principals whether termed principal offenders, aiders or abettors, or counsellors or procurers.

Bearing this proposition in mind, it follows, in my judgment, that the justices came to a wrong conclusion, and should have upheld the appellants' objection. However apt the words in the summons may be to describe the actual part taken by the appellants in the commission of the misdemeanour, the charge against them is to be treated in law as the same in degree as that charged against Gore, namely, that of principal offenders. By s. 8 of the Accessories and Abettors Act, 1861, aiders and abettors in misdemeanours shall be liable to be tried and punished as principal offenders. The words "shall be liable" import that the participators in the misdemeanour are to be regarded as having committed the same offence in law as the principal offender. Section 5 of the Summary Jurisdiction Act, 1848, is to the same effect. It is to be observed that this s. 5 does not create an offence as the justices seem to have thought, but merely regulates procedure and punishment.

Once it is established that the appellants aided and abetted, counselled or procured the sale by Gore of the article of food contrary to the provisions of s. 6 of the Sale of Food and Drugs Act, 1875, the appellants are to be treated as principal offenders with Gore. As the respondent Houghton purchased the article of food for test purposes, the limitation prescribed is applicable to them as to Gore. It follows that these proceedings are a prosecution under the Sale of Food and Drugs Acts in respect of the sale of an article of food purchased for test purposes, and that s. 19 of the Food and Drugs Act, 1899, is, by reason of the proceedings having been instituted after the expiration of twenty-eight days from the time of purchase, a fatal objection to the prosecution.

In my judgment, this appeal must be allowed with costs, and the case remitted to the justices to dismiss the summons.

Note.

The following cases on larceny must now be read subject to the provisions of s. 1 of the Larceny Act, 1916, which is as follows:

1. For the purposes of this Act—

(1) A person steals who, without the consent of the owner (*a*), fraudulently (*b*) and without a claim of right made in good faith (*c*), takes and carries away (*d*) anything capable of being stolen with intent, at the time of such taking (*e*), permanently to deprive the owner thereof (*f*).

Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee (*g*) or part-owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner:

(2) (i) The expression "takes" includes obtaining the possession—

(a) by any trick (*h*);

(b) by intimidation (*i*);

(c) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained (*k*);

(d) by finding, where at the time of the finding

(*a*) Case 29.
(*b*) Case 30.
(*c*) Case 31.
(*d*) Cases 32—34; and see sub-s. 2 (ii.) *infra*.
(*e*) Cases 35—42.
(*f*) Cases 42—45.
(*g*) Cases 46—48.
(*h*) Cases 49—53.
(*i*) Case 54.
(*k*) Case 42.

the finder believes that the owner can be discovered by taking reasonable steps (*l*);

(ii) the expression "carries away" includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached (*m*);

(iii) the expression "owner" includes any part-owner, or person having possession (*n*) or control of, or a special property (*o*) in, anything capable of being stolen:

(3) Everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen:

Provided that—

(a) save as hereinafter expressly provided with respect to fixtures, growing things, and ore from mines, anything attached to, and forming part of, the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof; and

(b) the carcase of a creature wild by nature and not reduced into possession while living shall not be capable of being stolen by the person who has killed such creature, unless after killing it he has abandoned possession of the carcase (*p*).

(*l*) Cases 55, 56.
(*m*) Cases 32—34.
(*n*) Case 57.
(*o*) Case 33.
(*p*) Cases 58, 59.

29.

R. v. EGGINTON AND OTHERS.

(1801) Leach, 913.

Egginton and others were indicted for burglary. They had applied to Joseph Phillips, the watchman at a manufactory, to assist them in robbing it. The premises consisted of a centre building, used for business purposes, and two wings consisting of dwelling-houses; access to the whole of the premises was by a door in a yard in front of them; there was no internal communication between the centre building and the dwelling-houses. Phillips agreed to open the door to the prisoners, but immediately informed Matthew Boulton, the owner of the manufactory, who told him to carry out the plan made with the prisoners, and consented to his opening the door and being with the prisoners the whole time. Phillips accordingly opened the door, and the prisoners, having gained access to the centre building, broke open a counting house and stole some ingots of silver, and were then taken by persons placed to watch them. It was contended for them (1) that no felony was committed as the whole was done with the knowledge and assent of the employer, and (2) that in any case it was but simple larceny, as the building broken into was not part of a dwelling-house, and there was no breaking, the door being left open. The jury found the prisoners guilty, but the objections were reserved for the opinion of the Judges.

The Judges were unanimously of opinion that the prisoners were not guilty of the burglary, inasmuch as the centre building . . . having no communication with the adjoining houses, could not be considered as part of any dwelling-house; but a majority held that the prisoners were guilty of the larceny, for although Matthew Boulton had permitted or suffered the meditated offence to be committed, he had not done anything originally to induce it; that **his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had; and that this could no more be considered as an assent than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts;** that there was no distinguishing between the degree of facility a thief might have given to him, that Boulton never meant that the prisoners should take away his property; that the design originated with the prisoners; and that all that Boulton did

was to prevent their design being carried into undetected execution, which differed the case greatly from what it might have been if he had employed his servant to suggest the perpetration of the offence originally to the prisoners.

30.

R. v. FARNBOROUGH.

(1895) 2 Q. B. 484 (C. C. R.).

F. was charged at Quarter Sessions with stealing milk. The jury could not agree upon a verdict and were asked by the chairman whether they believed the evidence for the prosecution. On the jury replying in the affirmative the chairman directed a verdict of guilty to be entered. *Held*, that the conviction was bad, since the jury had not found that the prisoner acted *animo furandi*.

Lord Russell of Killowen, C.J.—If this case did not raise a question of very considerable public importance, I should be content to say that this conviction cannot be allowed to stand. In dealing with the important question raised we must confine ourselves to what is stated in the case itself, from which it appears that the course which the proceedings took may be described thus. The prisoner was charged with stealing milk; evidence was called in support of the charge and the case was left to the jury on that evidence, no witnesses, except as to character, being called for the defence. The jury retired to consider their verdict, and some time elapsed, during which they made no communication to the chairman as to any point of difficulty in the case; the chairman then very properly sent for them, and asked if they were agreed on their verdict; they answered that they were not; whereupon he asked them whether they believed the evidence given for the prosecution. I do not stop to inquire whether he was right in inviting the opinion of the jury in this shape; the foreman, however, answered that question in the affirmative; whereupon the chairman said that their answer amounted in law to a verdict of guilty, and directed that verdict to be

recorded. But what did that answer of the foreman amount to, assuming that it expressed the opinion of the rest of the jury? The foreman, as the mouthpiece of the jury, had said that they were not agreed; and at the second question put to him he answered that they believed the evidence for the prosecution. What did that amount to? That they had heard certain witnesses depose to certain facts, and that they believed they were telling the truth. But it is quite consistent with the credit of the witnesses that the facts proved by them were not such as to show an *animus furandi* on the part of the prisoner, which is an essential ingredient of the crime of larceny; the jury might have assumed that the prisoner took the milk by leave, or that he intended to pay for it, or that the matter was too trivial to justify a conviction; indeed it is easy to see that the facts might be such as to justify the jury in believing the evidence, and yet declining to draw the inference that the prisoner had any *animus furandi*. The chairman in effect drew that inference himself, and found that the prisoner had acted with a guilty intent—a fact essential to be found before his guilt could be established; in doing so he went beyond his function, and infringed the well-established principle that **the jury are to decide all questions of fact and the Judge only questions of law.**

31.

R. v. CLAYTON.

[1920] 15 Cr. App. R. 45.

A. was convicted at Quarter Sessions of stealing 30s. from his wife, who had obtained a separation order against him. He took the money from his wife's purse, telling her that it was towards £5 which she owed him. He persisted throughout that he had a right to the money, and had a *bonâ fide* belief that he had a right to it. He was not defended at the trial. His wife denied that she owed him £5, and he did not go into the witness-box, and his defence was not put before the jury. *Held*, that the conviction could not stand.

Judgment of the Court of Criminal Appeal, delivered by: The Lord Chief Justice.—This conviction cannot stand

and must be quashed. Appellant was convicted of stealing 30s. belonging to his wife. He has all the way through persisted that he had a right to the money. The appellant's claim to the £5, even though he might have no legal right to take the 30s., ought to have been put to the jury by the Chairman as the defence. **Whether he was right or wrong he had a** *bonâ fide* **belief that he had a right to the money.** Therefore the appeal must be allowed.

32.

R. v. WYNN.

(1842) 2 C. & K. 859.

W. was indicted for stealing two letters, the property of the Post-master-General. His duty was to open certain bags and sort the letters. In doing so he made a mistake, and to avoid detection he carried away two letters and threw them down a water-closet:—*Held,* that he was guilty of larceny.

Alderson, B.—If a servant thinking that his master will inquire for a book, take it to a privy and throw it down, will not that be larceny?

Platt, B.—Or if a servant take one of his master's books to read, and it being called for, throw it away, intending to destroy it, would not that be larceny?

Alderson, B.—It turns on the question whether the prisoner threw away these letters, intending to destroy them. I understand the finding to be that the prisoner, to prevent the detection of the mistake, intended to destroy the letters.

Parke, B.—The question is, whether his dropping a letter with intent to destroy it is not a larceny. Is it not a larceny to destroy the property of another, to prevent the detection of a fault; and **was there not an asportation here, when the prisoner threw the letter from him?**

Lord Denman, C.J.—. . . With respect to the larceny I am clearly of opinion that an act of larceny was committed. **The jury find that this person takes the letters, and intend-**

ing to withdraw the letters entirely from the owners. This being so, it was larceny; and the *asportavit* was when he parted with the letters.

33.

R. v. JAMES WALSH.

(1824) 1 Moody, 14.

Larceny—Asportation.

The prisoner was tried at the Old Bailey Sessions on an indictment for stealing a leathern bag containing small parcels, the property of William Ray, the guard to the Exeter mail.

At the trial it appeared that the bag was placed in the front boot, and the prisoner, sitting on the box, took hold of the upper end of the bag, and lifted it up from the bottom of the boot on which it rested. He handed the upper part of the bag to a person who stood beside the wheel on the pavement, and both had hold of it together, endeavouring to pull it out of the boot, with a common intent to steal it. Before they were able to obtain complete possession of the bag, and while they were so engaged in trying to draw it out, they were interrupted by the guard, and dropped the bag.

The prisoner was found guilty, but the facts above stated were specially found by the jury, in answer to questions put to them by the Common Serjeant.

The Common Serjeant entertaining some doubts whether the prisoner could be truly said to have "stolen, taken, and carried away" the bag, he respited the judgment, in order that the opinion of the Judges might be taken on the case.

In Easter Term, 1824, the Judges met and considered this case. They held the conviction right, being of opinion that there was a complete asportation of the bag.

34.

R. v. TAYLOR.

(1911) 80 L. J. K. B. 311.

The prosecutor was on the platform of a railway station. The prisoner came behind him, put his hand into his pocket, took hold of his purse, and pulled it up to the edge of the pocket, where it caught in the belt of the prosecutor, who then grasped it and put it back in his pocket. *Held*, that there was sufficient asportation to constitute larceny, though not sufficient to constitute larceny from the person, which is not committed if the article is not actually severed from the prosecutor, though moved from the place where it was.

Judgment of the Court of Criminal Appeal delivered by:

PICKFORD, J.—In this case the appellant appeals against convictions at the Wiltshire Quarter Sessions for larceny from the person and for being an habitual criminal, for which he was sentenced to three years' penal servitude and five years' preventive detention. It was objected that there was no evidence on which he could be convicted of larceny from the person, and that the chairman misdirected the jury. It was also contended that the only evidence was evidence of an attempt, for which the appellant could not be sentenced to penal servitude, and therefore not to preventive detention. The evidence was stated with substantial accuracy in the summing-up. The chairman said: "The prosecutor was looking for a carriage, when the defendant came behind him, put his hand in his trousers pocket and pulled the purse out of the pocket, when it caught in his belt. Then the prosecutor in his own phraseology said, 'I grasped it out of his hand, put the purse back in my pocket, and tried to catch him.'" That was not absolutely accurate, for the evidence was that the purse was pulled, not out of, but only to the edge of, the pocket. The chairman also said: "If you are satisfied that the purse was actually in the man's hand you will be justified in returning a verdict for the full charge." The full charge was larceny from the person. That was not quite accurate, because it did not deal with the question of asportation, and if the purse was merely in the defendant's hand and there

was no asportation, it would be wrong. But the chairman went on to state the story told by the prisoner, and wound up by saying: "It is for you to consider whether the defendant has given an explanation of the circumstances of what occurred after Mr. Barnes (the prosecutor) turned on him, and it is for you to say which of the two stories you believe." It was therefore left to the jury to say which story they believed. They believed the prosecutor, and found the prisoner guilty of larceny from the person. They did that on a somewhat misleading direction, but it is quite clear that they must have found that the facts were that the prisoner had taken the purse in his hand and had lifted it from the bottom of the pocket to the edge of it, where it caught in the belt. In those circumstances there was enough to constitute simple larceny; for the cases show that **if a man puts his hand into the pocket of another, and removes his purse from where it was to the edge of the pocket, and is only prevented from getting full possession of it because it catches in a belt, there is a sufficient asportation to constitute simple larceny.** The jury accepted those facts, and they are sufficient to justify a verdict of simple larceny. In these circumstances we have power, under s. 5 (2) of the Criminal Appeal Act, 1907, to substitute for the verdict found by the jury the verdict which they could have found, and to pass such sentence in substitution for the sentence passed as may be warranted in law, not being one of greater severity. We think that the jury must be taken to have found facts sufficient to prove a simple larceny, and we therefore substitute for the conviction for larceny from the person a verdict of guilty of simple larceny; and as it is competent to the Court on that verdict to pass a sentence of three years' penal servitude, we impose that sentence because we think that the Court below would have done so.

35.

R. v. CHARLES JONES.

(1841) C. & M. 613.

The prisoner, who was not otherwise in the service of the prosecutor, was employed by the prosecutor to drive six pigs from C. to U. On the way he left one with a man named Matthews, stating that it was tired, and told the prosecutor that he had done so. The prosecutor told the prisoner to go and ask Matthews to keep the pig for him. The prisoner went to Matthews and sold the pig to him. *Held*, no larceny.

CRESSWELL, J.—The Judges appear to have acted lately on a very nice distinction. **If a man is allowed to have the possession of a chattel and he converts it to his own use, it is not larceny, unless he had an intention of stealing it when he obtained the possession of it, but if he has merely the custody of a chattel, he is guilty of a larceny if he disposes of it, although he did not intend to do so at the time when he received it into his custody.** Here it appears that the prisoner left the pig on Sunday, the 19th, and if nothing more had appeared I should have held that Matthews kept it merely for the prisoner; but on Monday, the 20th, he told the prosecutor that he had left it there, and the prosecutor told him to ask Matthews to allow the pig to remain there till the Saturday. The prosecutor thus consented to Matthews being the keeper of the pig for him, and therefore his custody became the custody of the prosecutor, and then the prisoner goes and sells the pig to Matthews. I think that the prisoner must be acquitted.

36.

R. v. CHARLES RILEY.

(1853) Dears. C. C. 149.

R. put twenty-nine lambs into a field in which there were already some other lambs. The next morning, in taking away his own lambs, he took by mistake one of the others. On discovering his mistake he sold all the thirty and denied having done so. *Held*, that he was rightly convicted of larceny.

POLLOCK, C.B.—Here the taking of the lamb from the

field was a trespass; or if it be said that there was no taking at that time, then the moment he finds the lamb he appropriates it to his own use. The distinction between the cases is this, **if the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful and then a man disposes of the chattel** *animo furandi,* **it is larceny.**

PARKE, B.—The original taking was not lawful. The prisoner being originally a trespasser, he continued a trespasser all along . . . and being a trespasser, the moment he took the lamb with a felonious intent he became a thief.

37.

R. v. RICHARDS.

(1910) 80 L. J. K. B. 174.

A. was indicted under s. 31 of the Larceny Act, 1861 (*a*), for stealing fixtures from houses belonging to the prosecutor. He had, as the jury found, entered into an agreement for a lease of the houses with the fraudulent intention of stealing the fixtures on obtaining possession. *Held,* that he was rightly convicted of larceny.

Judgment of the Court of Criminal Appeal delivered by:

PICKFORD, J.—This case raises the question whether or not we ought to follow *Rex* v. *Munday* (*b*). If that case is to be followed, and the jury find that the appellant entered into the agreement for a lease for the purpose of getting possession of the houses with the fraudulent intention of stealing the fixtures, and that he in fact stole them, he is guilty of larceny. In this case the jury must be taken to have found that the appellant, at the time when he entered into the agreement, had no intention of becoming a *bonâ fide* tenant—that is to say, with any intention of occupying for the purpose for which tenants usually occupy, but entered into the agreement simply for the purpose of getting possession of the

(*a*) Now replaced by s. 8 (1) of the Larceny Act, 1916.
(*b*) 2 Leach. 991.

houses in order to steal the fixtures which he is charged in the indictment with stealing. If the question put by the chairman was a proper question to be left to the jury, the evidence given was admissible for the purpose of showing the intention with which the appellant got possession of the houses. The question then is, are we prepared to follow *Rex* v. *Munday*? That case is no doubt not very satisfactory, as no argument is given and no considered judgment was delivered. It is difficult in these circumstances to see the train of reasoning upon which the judgment proceeded, but the Judges on a reference to them affirmed the conviction. That case was decided considerably more than a century ago, and has been considered as an authority ever since. We think, therefore, that it is a case which we ought to follow, and that being so there was no misdirection.

38.

R. v. HARVEY.

(1840) 9 C. & P. 353.

H. was asked by the prosecutor to take three pigs in a cart and show them to a lady who was a possible purchaser; he was not, however, to sell the pigs to the lady, but, whether she approved of them or not, he was in any case to bring them back to the prosecutor. H. sold the three pigs to other persons and drove away with the horse and cart to another town, where he was taken into custody; on his arrest he said that he was going to take the horse and cart back to the prosecutor when he had dined. He was indicted for larceny of the pigs and of the horse and cart. *Verdict*, guilty of stealing the pigs but not the horse and cart.

Alderson, B., in summing up, said,—There are two questions for your consideration in this case. The first is whether the prisoner had a felonious intent from the commencement of the transaction; and the second, whether he received the pigs as bailee to deal with them, or only as a servant having the custody of them, and whose duty it was to bring them back. If the prosecutor meant that the prisoner should leave the pigs with the lady, and either bring back the money or

make a bargain for the sale of them, then he will be in the situation of a bailee. The question is whether they were delivered to the prisoner simply that he should show them to the lady, and bring them back bodily; if they were, then, if the felonious intent came upon him at that time, it would come upon him at the time when he had only the **custody** and **not the possession,** and in that case he would be guilty of stealing them. With respect to the horse and cart, it is clear that the **custody** of them only was delivered to the prisoners; and then the question arises, whether he intended to steal them or meant to bring them back to the prosecutor.

39.

R. v. COOKE.

(1871) L. R. 1 C. C. R. 299.

C. was employed as foreman by B. It was C.'s duty to make up the wages book and obtain from B.'s cashier the amount necessary to pay the workmen. C. fraudulently entered in the wages book the sum of £1 10s. 4d. as due to a workman to whom only £1 8s. was due. The total amount of the wages due was thus represented as £21 18s., which C. received from the cashier. After obtaining this sum he paid to the workman in question his proper wages of £1 8s. and appropriated to his own use the excess of 2s. 4d., intending to do so at the time when he received the sum of £21 18s. *Held,* that C. was guilty of larceny.

Bovill, C.J.—The point submitted to us is whether in this case there was any evidence to go to the jury of a larceny. The objection was, that even if the facts, as stated, were proved the offence of the prisoner was not a felony, but that of obtaining money by false pretences. . . . Now, it is expressly stated that the prisoner, after receiving £21 18s. of his master's money, paid *thereout* certain moneys on his master's account, and "fraudulently appropriated *thereout* to his own use the sum of 2s. 4d." Thus the whole foundation of one of Mr. Streeten's arguments fails. He says the jury

could not find that the particular moneys intrusted, or any particular moneys, were appropriated. The case states otherwise. It steers clear of the difficulties which have arisen in some cases, such as *R.* v. *Thompson* (*a*), inasmuch as the misapplication is found to have been of a portion of the very moneys delivered to the prisoner.

It was next contended that the manner in which the prisoner obtained the £21 18s. was an obtaining the money by false pretences did not amount to larceny. If this had been the only circumstance in the case, the question would have had to be determined, and it would have been a question for the jury.

But **after the money was handed over, whose property was it? I think the evidence shows it was the master's; and, if so, at common law, the possession was the master's too. A servant and a bailee at common law are in a different position; for a bailee has the possession of the goods entrusted to him, a servant only the custody. A servant could therefore be indicted for stealing the things in his custody, but in his master's possession.** Difficulties arose, it is true, in cases where the servant received property from a third person, and appropriated to his own use before it ever came into the hands of his master or of any fellow-servant for him. And hence the statutes as to embezzlement were passed. But in all other cases the offence was larceny at common law, as in *R.* v. *Watts* (*b*). So in **this case the money, while in the prisoner's hands, was clearly his master's money at the time of the misappropriation, and it was in the constructive possession of the master. The misappropriation of it was therefore larceny.**

Even if the prisoner had anything more than the bare custody of the money as a servant, it is difficult to see why he did not hold it as a bailee within the meaning of the section which has been referred to. But this it is unnecessary to decide.

(*a*) L. & C. 233; 32 L. J. (M. C.) 57.
(*b*) 2 Den. C. C. 14.

40.

R. v. TIDESWELL.

[1905] 2 K. B. 273 (C. C. R.).

T. was in the habit of buying ashes from B. It was the duty of C., B.'s weigher, to enter in a book a record of the weight of the ashes sold by B., in order that purchasers might be charged with the proper amounts. C. fraudulently and in collusion with T. delivered to T. 32 tons 13 cwt. and entered the weight in the book as 31 tons 3 cwt. *Held,* that T. was guilty of larceny of 1 ton 10 cwt.

Lord Alverstone, C.J.—Upon the point reserved for our consideration upon the case as originally stated, namely, whether the indictment for larceny could be supported in the absence of proof of larceny of any specific portion of the goods, I entertained no doubt whatever. But in the course of the argument a question was raised as to whether the **property in the goods had not already passed to the prisoner at the time of the fraudulent entry in the weight-book, and whether consequently, whatever other criminal offence he might have committed, he could be properly charged with larceny** and as we thought the case did not sufficiently state the facts with respect to that matter we sent it back to be restated. The question whether the prisoner's offence amounts to larceny must depend upon the circumstances under which he received the goods. Suppose the owner of a flock of sheep were to offer to sell, and a purchaser agreed to buy, the whole flock at so much a head, the owner leaving it to his bailiff to count the sheep and ascertain the exact number of the flock, and subsequently the purchaser were to fraudulently arrange with the bailiff that whereas there were in fact thirty sheep they should be counted as twenty-five and the purchaser should be charged with twenty-five only, there would be no larceny, because the **property** would have passed to the purchaser before the fraudulent agreement was entered into. On the other hand, if the owner were to leave it to his bailiff to arrange the sale, authorizing him to sell as many sheep out of the flock as the purchaser should be willing to buy, then if the contract of sale arranged between

the bailiff and the purchaser was expressed to be for twenty-five sheep and the whole thirty were fraudulently delivered to the purchaser, the obtaining possession of the five sheep as to which there was no contract of sale would amount to larceny. In the present case, as restated, it appears there was no contract with the managing director that the prisoner should buy the whole of the ashes in the trucks, but only such a quantity as should be defined by the weighing; in other words, there was no contract of purchase except that made with Kaye. That being so, the case is governed by the principle in *R.* v. *Hornby* (*a*), where the prisoner received goods from the servant of the owner under colour of a pretended sale, and it was held that the fact of his having received the goods with the knowledge that the servant had no authority to sell, and was in fact defrauding his master, was sufficient to support an indictment for larceny. Conviction upheld.

41.

R. v. PRINCE.

(1868) L. R. 1 C. C. R. 150.

P. had a deposit account with a bank and had £900 standing to his credit. P.'s wife, by a forged order purporting to be that of P., obtained payment of the £900 deposit and interest and eloped with the prisoner. Among the money paid to P.'s wife was a bank-note for £100, which the prisoner was proved to have paid away shortly after its receipt from the bank and before the elopement. The prisoner said he had it from P.'s wife. *Held*, that the cashier of the bank had a general authority to deal with the money of the bank and to part with it on genuine orders; though he had been deceived by the forged order he intended to part with the property in the money paid to P.'s wife. His offence was not therefore larceny and the prisoner could not be convicted of knowingly receiving a stolen note.

Blackburn, J.—I must say I cannot but lament that the law now stands as it does. The distinction drawn between

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(*a*) 8 C. & P. 288.

larceny and false pretences, one being made a felony and the other a misdemeanour—and yet the same punishment attached to each—seems to me, I must confess, unmeaning and mischievous. The distinction arose in former times, and I take it that it was then held in favour of life that in larceny the taking must be against the will of the owner, larceny then being a capital offence. However as the law now stands, **if the owner intended the property to pass,** though he would not so have intended had he known the real facts, **that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with his master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it. If, however, the servant's authority is limited, then he can only part with the possession, and not with the property; if he is tricked out of the possession, the offence so committed will be larceny.** In *R.* v. *Longstreeth* (*a*) the carrier's servant had no authority to part with the goods, except to the right consignee. His authority was not generally to act in his master's business, but limited in that way. The offence was in that case held to be larceny on that ground, and this distinguishes it from the pawnbroker's case which the same Judges, or, at any rate, some of them, had shortly before decided. There the servant from whom the goods were obtained had a general authority to act for his master, and the person who obtained the goods was held not to be guilty of larceny. So, in the present case, the cashier holds the money of the bank with a general authority from the bank to deal with it. He has authority to part with it on receiving what he believes to be a genuine order. Of the genuineness he is the judge, **and if under a mistake he parts with the money, he none the less intends to part with the property in it and thus the offence is not, according to the cases, larceny, but an obtaining by false pretences.**

(*a*) 1 Moo. C. C. 137.

42.

R. v. MIDDLETON.

(1873) L. R. 2 C. C. R. 38.

M. was a depositor in a P.O. Savings Bank in which 11s. stood to his credit. He gave notice to draw 10s.; a warrant of withdrawal was accordingly sent to him and a letter of advice sent to the post office. He went to the post office and handed in the notice of withdrawal and his deposit-book, but the clerk referred to the wrong letter of advice and put down on the counter £8 16s. 10d. M. picked up the money and went away. The jury found that at the time of taking the money M. knew of the mistake and had the *animus furandi*. *Held*, that M. was guilty of larceny.

Judgment of COCKBURN, C.J., BLACKBURN, MELLOR, LUSH, GROVE, DENMAN, and ARCHIBALD, JJ.—In the present case the jury have found that the prisoner had *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up. So far, therefore, as the guilty knowledge and felonious intention are ingredients in the crime of stealing, we must take it as proved that the prisoner was guilty; but the case states facts which raise the doubt whether under the circumstances stated, this was a *taking*, and also whether it was a stealing within the meaning put by the law on these averments in an indictment for larceny. . . . And the circumstances which raise that doubt are as follows: Assuming that the clerk who actually was engaged in the transaction had such authority from the Postmaster-General that all he did is to be taken as done by the Postmaster-General, it is the first question whether the money can be said to have been taken by the prisoner within the meaning of the averment, inasmuch as the clerk (who on this hypothesis is the Postmaster-General) certainly meant that the prisoner should take up that money, though he only meant this because of a mistake. Then a second question arises whether it can be properly said that he stole the money, inasmuch as the clerk, and therefore on this hypothesis the Postmaster-General, intended that the property in the money should belong to the

man before him, though he intended that as a consequence of a mistake as to his identity, and the prisoner from the beginning knew of the mistake, and had at the time of taking the guilty intention to steal the money. A third question arises in the event of the two first questions being determined in favour of the prisoner, viz., whether the clerk really had such general authority as to represent the Postmaster-General, or whether his authority was not limited to paying the money specified in the letter of advice, viz., 10s., which special authority, if it was so limited, he did not pursue.

The majority of the Judges, eight in number, have formed their judgment on the decision of the first two points in favour of the Crown, which therefore renders it unnecessary for them to decide the last.

The Lord Chief Justice of the Common Pleas, the Lord Chief Baron, and my Brother Keating who agree with the majority in thinking the conviction should be affirmed do so solely on the last ground, that the authority of the clerk was a special authority not pursued, and their reasons are stated in two separate judgments.

It is not to be understood that the eight who form the rest of the majority decide this question the other way, but merely that they consider it unnecessary to decide it at all.

We now proceed to state the reasons on which we think that it ought to be held that there was, under the circumstances stated, a "taking" within the meaning of the averment in the indictment.

We agree, that according to the decided cases **it is no felony at common law to steal goods if the goods were already lawfully in possession of the thief;** and that, therefore, at common law a bailee of goods, or a person who finds goods lost, and not knowing or having the means of knowing whose they were, takes possession of them, is not guilty of larceny if he subsequently, with full knowledge and felonious intention, converts them to his own use.

It is, to say the least, very doubtful whether this doctrine is either wise or just; and the Legislature, in the case of bailees, have by statute enacted that bailees stealing goods,

etc., shall be guilty of larceny without reference to the subtle exceptions engrafted by the cases on the old law. But in such a case as the present there is no statute applicable, and we have to apply the common law.

Now we find that it has been often decided that where the true owner did part with the physical possession of a chattel to the prisoner, and therefore in one sense the taking of the possession was not against his will, yet if it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the possession, it is sufficient taking . . . . The cases on the subject are collected in "Russell on Crimes" (4th ed.), vol. 2, p. 207; perhaps those that most clearly raise the point are *Rex* v. *Davenport* (*a*), and *Rex* v. *Savage* (*b*).

In the present case the finding of the jury, that the prisoner, at the moment of taking the money, had the *animus furandi,* **and was aware of the mistake, puts an end to all objection arising from the fact that the clerk meant to part with the possession of the money.**

On the second question, namely, whether, assuming that the clerk was to be considered as having all the authority of the owner, the intention of the clerk (such as it was) to part with the property prevents this from being larceny, there is more difficulty, and there is, in fact, a serious difference of opinion, though the majority, as already stated, think the conviction right. The reasons which lead us to this conclusion are as follows: At common law the property in personal goods passes by a bargain and sale for consideration, or a gift of them accompanied by delivery; and it is clear, from the very nature of the thing, that an intention to pass the property is essential, both to a sale and to a gift. But it is not at all true that an intention to pass the property, even though accompanied by a delivery, is of itself equivalent to either a sale or a gift. We will presently explain more fully what we mean and how this is material.

Now it is established that where a bargain between the

(*a*) 2 Russell on Crimes, 4th ed. at p. 201.
(*b*) 5 C. & P. 143; 2 Russell on Crimes, 4th ed. at p. 201.

owner of the chattel has been made with another, by which the property is transferred to the other, the property actually passes, though the bargain has been induced by fraud. The law is thus stated in the judgment of the Exchequer Chamber in *Clough* v. *L. & N. W. R.* (*c*), where it is said: "We agree completely with what is stated by all the judges below, that the property in the goods passed from the London Pianoforte Co. to Adams by the contract of sale; **the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing,** but merely gave the party defrauded a right on discovering the fraud to elect whether he would continue to treat the contract as binding, or disaffirm the contract and resume his property. . . . We think that so long as he has made no election he retains his right to determine it either way, subject to this—that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property; or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind."

It follows obviously from this that no conversion or dealing with the goods, before the election is determined, can amount to a stealing of the vendor's goods; for they had become the goods of the purchaser, and still remained so when the supposed act of theft was committed. There are, accordingly, many cases, of which the most recent is *R.* v. *Prince* (*d*), which decide that in such a case the guilty party must be indicted for obtaining the goods by false pretences, and cannot be convicted of larceny. In that case, however, the money was paid to the holder of a forged cheque payable to bearer and therefore vested in the holder, subject to the right of the bank to divest the property.

In the present case the property still remains that of the Postmaster-General, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded; there was no gift of it to him, for there was no intention to give it to him or to anyone. **It was simply a**

(*c*) L. R. 7 Ex. 26.
(*d*) L. R. 1 C. C. R. 150.

handing it over by a pure mistake, and no property passed. . . .

We admit that the case is indistinguishable from the one supposed in the argument of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi* (*e*).

But it is further urged that, if the owner, having power to dispose of the property, intended to part with it, that prevents the crime from being that of larceny, although the intention was inoperative and no property passed. In almost all the cases on the subject the property had actually passed, or at least the Court thought it had passed; but two cases, *Rex* v. *Adams* (*f*) and *Rex* v. *Atkinson* (*g*), appear to have been decided on the ground that an intention to pass the property, though inoperative and known by the prisoner to be inoperative, was enough to prevent the crime from being that of larceny. But we are unable to perceive or understand on what principles the cases can be supported if *Rex* v. *Davenport* (*h*) and the other cases involving the same principle are law; and though if a long series of cases had so decided, we should think we were bound by them, yet we think that in a Court such as this, which is in effect a Court of error, we ought not to feel bound by two cases which, as far as we can

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(*e*) This very point arose later in *R.* v. *Ashwell* (1885) 16 Q. B. D. 190. In this case, A., being asked by B. for the loan of a shilling, by mistake gave B. a sovereign, which B. accepted believing it to be a shilling, and, later, on discovering it to be a sovereign, appropriated it to his own use. B. having been convicted of larceny, the case was argued in the Court of Crown Cases Reserved, before fourteen Judges, who were equally divided as to whether B. was guilty of larceny and the conviction accordingly stood. Apparently, in such a case the "taking" occurs when the recipient first becomes aware of what he has received and not at the time when he takes physical possession (see *R.* v. *Mortimer* 1 Cr. App. R. 20).

(*f*) 2 Russell on Crimes (4th ed.), at p. 200.

(*g*) 2 East P. C. 673.

(*h*) 2 Russell on Crimes (4th ed.), at p. 201.

perceive, stand alone, and seem to us contrary both to principle and justice.

Judgment of Bovill, C.J., and Keating, J., delivered by:

Bovill, C.J.—It appears to us that the moneys received by the postmasters at their respective offices . . . are the property of the Crown or of the Postmaster-General, and that neither the postmasters, nor the clerks at the post offices, have any power or authority, either general or special, to part with the property in, or even the possession of, the moneys so deposited, or any part of them, to any person, except on the special authority of the Postmaster-General.

In this case the prisoner had received a warrant or authority from the Postmaster-General, entitling him to repayment of 10s. (being part of a sum of 11s. which he had deposited) from the post-office at Notting Hill, and a letter of advice to the same effect was sent by the Postmaster-General to that post-office, authorizing the payment of the 10s. to the prisoner.

Under these circumstances we are of opinion that neither the clerk to the postmistress, nor the postmistress personally, had any power or authority to part with the £5 note, three sovereigns, the half-sovereign, and silver and copper, amounting to £8 16s. 10d., which the clerk placed upon the counter, and which was taken up by the prisoner.

In this view the present case appears to be indistinguishable from other cases where obtaining articles *animo furandi* from the master of a post-office, though he had intentionally delivered them over to the prisoner, has been held to be larceny, on the principle that the postmaster had not the property in the articles, or the power to part with the property in them. For instance, the obtaining the mail-bags by pretending to be the mail-guard, as in *R.* v. *Pearce* (*i*); the obtaining a watch from the postmaster by pretending to be the person for whom it was intended, as in *R.* v. *Kay* (*k*) (where *R.* v. *Pearce* was relied upon in the judgment of the Court); and the obtaining letters from the postmaster under pretence of being the servant of the party to whom they were

(*i*) 2 East P. C. 603.
(*k*) D. & B. 231.

addressed, as in *R.* v. *Jones* (*l*) and in *R.* v. *Gillings* (*m*) were all held to be larceny.

The same principle has been acted upon in other cases, where the person having merely the *possession* of goods, without any power to part with the *property* in them, has delivered them to the prisoner, who has obtained them *animo furandi*; for instance, such obtaining of a parcel from a carrier's servant by pretending to be the person to whom it was directed, as in *R.* v. *Longstreeth* (*n*), or obtaining goods through the misdelivery of them by a carman's servant through mistake to a wrong person who appropriated them *animo furandi*, as in *R.* v. *Little* (*o*), were, in like manner, held to amount to larceny.

In all these and other similar cases, many of which are collected in 2 "Russell on Crimes," 211 to 215, the *property* was considered to be taken without the consent and against the will of the owner, though the *possession* was parted with by the voluntary act of the servant, to whom the property had been entrusted for a special purpose. And where property is so taken by the prisoner knowingly, with intent to deprive the owner of it and feloniously to appropriate it to himself, he may, in our opinion, be properly convicted of larceny.

The case is very different where the goods are parted with by the owner himself, or by a person having authority to act for him, and where he or such agent intends to part with the *property* in the goods; for then, although the goods be obtained by fraud, or forgery, or false pretences, it is not a taking against the will of the owner, which is necessary in order to constitute larceny.

The delivery of goods by the owner upon an order which was in fact forged, as in *R.* v. *Adams* (*p*), the payment of money by a banker's cashier on a cheque which turned out to be a forgery, as in *R.* v. *Prince* (*q*), and the delivery up of pledges by a pawnbroker's manager by mistake and through fraud, as in *R.* v. *Jackson* (*r*), are instances of this kind, and

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(*l*) 1 Den C. C. 188.
(*n*) 1 Moo. C. C. 137.
(*p*) 1 Den. C. C. 38.
(*r*) 1 Mood C. C. 119.
(*m*) 1 F. & F. 36.
(*o*) 10 Cox C. C. 559.
(*q*) L. R. 1 C. C. R. 150.

where the intent voluntarily to part with the property in the goods, by a person who had authority to part with the property in them, prevented the offence being treated as a larceny.

In the present case, not only had the postmistress or her clerk no power or authority to part with the property in this money to the prisoner, but the clerk, in one sense, never intended to part with the £8 16s. 10d. to the person who presented an order for only 10s.; and he placed the money on the counter by mistake, though at the time he (by mistake) intended that the prisoner should take it up, and by mistake entered the amount in the prisoner's book. When the money was lying upon the counter, the prisoner was aware that he was not entitled to it, and that it could not be, and was not, really intended for him, yet, with a full knowledge on his part of the mistake, he took the money up and carried it away, intending at the time he took it to deprive the owner of all property in it, and feloniously to appropriate it to his own use.

There was, therefore, as it seems to us, a wrongful and fraudulent taking and carrying away of the whole of this money by the prisoner, without any colour of right, *animo furandi*, and against the will of the real owner; and for these reasons, and upon the authorities before stated, we think the prisoner was properly convicted of larceny.

43.

R. v. HALL.

(1848) 2 C. & K. 947.

H. took fat from a loft of B., a tallow-melter, and brought it to B.'s candle-room and placed it in the scale, and wished B. to buy it as fat sent by a butcher named R. B. refused to buy it, and H. ran away. *Held*, a larceny, and that the fact that the thief intended to induce owner to buy his own fat made no difference.

DEARSLEY (for the prisoner).—I submit that the prisoner was not guilty of larceny, and that this is like the case of *Reg.*

v. *Holloway*, which has just been decided, as the prisoner did not intend to deprive his master permanently of the property.

Parke, B.—He usurped the entire property in the goods, for the purpose of enabling the other person to sell them to the owner.

Dearsley.—It was never intended that the goods should be taken permanently out of the possession of the owner.

Coleridge, J.—In whose dominion were they, when he was trying to sell them?

Alderson, B.—In the case of *R.* v. *Holloway* the prisoner never intended to treat the goods as other than the goods of the master. Here he does.

Parke, B.—**Here the intention was never to return the goods to the master, as the master's own property; he was only to get them by paying for them.**

Dearsley.—I submit, that to constitute larceny, there must be a taking away for the sake of lucre, an asportation, and an intent to deprive the owner of the goods of his goods for ever *in specie*? I admit there was a *lucri causa* here.

Coleridge, J.—You would contend that if a person took a horse from a field and intended to keep him a month, and disguise him and sell him to the owner as the horse of a third person, that would be no larceny.

Dearsley.—That is exactly this case.

Alderson, B.—But a more lively mode of putting it.

Dearsley.—I admit an asportation and a lucre; but so far from any intent to deprive the owner of his property, the intention was that the owner should keep it, but that a cheat should be practised upon him. It is almost a contradiction in terms to say that there was an intent to deprive him of the value of them in money.

Alderson, B.—According to your argument, if a man stole a bank-note intending to bring it to the owner to be changed, it would be no larceny.

Dearsley.—As that would fall within the principle, I should submit that it would be no larceny.

Denman, C.J.—**The question here is, whether there was an intent to deprive the owner of his property permanently.**

How could that be done more effectually than by selling it? It is no matter to whom it is sold.

PARKE, B.—The intent of the party here was not only to deprive the owner of his goods, but to commit the impudent fraud of making him buy his own goods, and pay for them.

ALDERSON, B.—Here the owner is never to get his goods again, but by paying the full value for them.

44.

R. v. HOLLOWAY.

(1848) 2 C. & K. 942.

A., who was in the employ of B., a tanner, took skins from a warehouse of B. to C., the foreman of B., at another part of the premises, pretending that he had done work on them for which he was to be paid. A. intended to return the skins to his master when he had been paid for his pretended work on them. *Held*, no larceny but an attempt to obtain money by false pretences.

PARKE, B.—Taking a chattel for a temporary purpose is no larceny.

DENMAN, C.J.—If a man took another's horse without leave, intending to ride it to every fair in England (which would take him a year) and then return the horse at the end of that time, would that be larceny?

LOWNDES (for the prisoner).—I should submit that it might be.

DENMAN, C.J.—I think not; and if you cannot make that out a larceny, you have no hope here.

LOWNDES.—Larceny has never been correctly defined. *Lucri causa* has been sometimes considered necessary, and also an intent to deprive the owner permanently of his property; but this has never been expressly decided.

PARKE, B.—Yes, in the case from Cornwall (*a*).

ALDERSON, B.—Is not this a case of false pretence?

LOWNDES.—No money was obtained.

ALDERSON, B.—It is then an attempt to commit the misdemeanor of obtaining money by false pretence.

(*a*) *R.* v. *Webb*, 1 Moo. C. C. 431.

DENMAN, C.J.—If we were to hold that wrongfully borrowing a thing for a time with an intention to return it would constitute a larceny many very venial offences would be larcenies. In late cases there has been an understanding that **to constitute larceny, it is essential that there should be an intent to deprive the owner permanently of his property.** It is certainly an odd excuse for a person who is challenged with his master's property, that he meant to return it, after having cheated his master, in the first place, and his fellow-workman, in the second; still, a man can hardly do this without committing some offence, although it be not larceny.

PARKE, B.—The definitions of larceny are none of them complete; Mr. East's is the most so, but that wants some little explanation. His definition is "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property without the consent of the owner." This is defective in not stating what the meaning of "felonious" in this definition is. It may be explained to mean that there is no colour of right or excuse for the act; **and the "intent" must be to deprive the owner not temporarily but permanently of his property.** Cases also show that a taking of goods with an intent to return them is not larceny. . . . Unless it was made out to the satisfaction of the jury, that the prisoner meant to deprive his master of his property permanently, I think the offence of larceny was not made out.

45.

REX v. CHARLES CRUMP.

(1825) 1 C. & P. 658.

Larceny—Intent.

The prisoner was indicted for stealing a horse, three bridles, two saddles, and a bag, the property of Henry Bateman.

It appeared that he got into the prosecutor's stable and took away the horse and the other property all together; but that, when he had got to some distance, he turned the horse loose, and proceeded on foot to Tewkesbury, where he was stopped attempting to sell the saddles.

Garrow, B., left it to the jury to say whether the prisoner had any intention of stealing the horse; for that, if he intended to steal the other articles, and only used the horse as a mode of carrying off the plunder more conveniently, and, as it were, borrowed the horse for that purpose, he would not be, in point of law, guilty of stealing the horse.

46.

R. v. BUNKALL.

(1864) L. & C. 371 (C. C. R.).

B. had a horse and cart of his own in which he was accustomed to fetch coal for the prosecutor from a railway station, being paid 4s. a ton for the carriage. He was requested to fetch half a ton and was given 8s. 6d. to pay for it. At the station he had 9 cwt. put into the cart and 1 cwt. put into a sack. The prosecutor's name was not mentioned and the receipt was made out in the prisoner's name. On his return he only delivered 9 cwt. to the prosecutor and converted to his own use the remaining 1 cwt. In answer to the questions of the prosecutor, who suspected that he was not getting the whole amount, the prisoner had asserted that there was full weight, for he had seen the coals weighed. *Held*, that he was rightly convicted of larceny as a bailee.

Cockburn, C.J.—We are all of opinion that the conviction is good. The case turns on the construction of the 24 & 25 Vict. c. 96, s. 3, which enacts that "Whosoever, being a bailee of any chattel, money or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny" (*a*). In this case the prisoner was entrusted with money to buy coals, which he was to bring home to the

(*a*) See now s. 1 (1) of the Larceny Act, 1916 (*ante*, p. 79).

prosecutor for remuneration in the prisoner's own cart. The prisoner having bought the coals abstracted a portion of them with the intention of appropriating such portion to his own use.

Some members of the Court are of opinion that, even if there was no evidence of any specific appropriation of the coals by the prisoner to the prosecutor, yet, as they were bought with the prosecutor's money given by him to the prisoner for that purpose, that would *ipso facto* vest the property of the coals in the prosecutor, and so there would be a bailment within the terms of the statute.

Others are of opinion that a specific appropriation of the coals by the prisoner to the prosecutor was necessary and that there was evidence of such specific appropriation. The prisoner went with the prosecutor's money to buy coals, put them into the cart and took a portion for himself, pretending to the prosecutor that he had brought the whole of the coal to him. We are all of opinion that this was evidence of a **specific appropriation** sufficient to justify the jury in coming to the conclusion at which they arrived.

47.

R. v. DE BANKS.

(1884) 53 L. J. M. C. 132 (C. C. R.).

The prosecutor left a mare at Chester in the charge of the prisoner, telling him it was to be sold next Wednesday, when the prosecutor was coming to Chester. On the following Wednesday the prosecutor did not go to Chester himself, but sent his wife. She saw the prisoner riding the mare about a horse fair, and saw him sell it and receive some money, for which she asked him; the prisoner, however, refused to give her the money, and absconded with it. *Held*, that he was guilty of larceny as a bailee.

Lord Coleridge, C. J.—I think this conviction may be supported. It is doubtful whether, under the circumstances, the prisoner was not entrusted as a servant, and embezzled; but we have not to consider that point, the chairman having ruled otherwise, and the jury not having had the question left to them. The only point we have to consider is, whether

there was evidence to justify a conviction for larceny. Probably the prisoner was entrusted with the horse for sale: the jury have so found, and the evidence of the prosecutor would seem to show that that finding was correct. I think the effect of the evidence is that the prisoner was there to sell the mare and the receive the money derived from such sale, and then to hand it over to the prosecutor or to his agent, who in this case was his wife. It seems to me that the prisoner was a bailee of the money—for the wife who attended as agent of the prosecutor. She demanded the money, the prisoner refused, and thereupon he was guilty of larceny of that money of which he was bailee.

FIELD, J.—I also think that the judgment must be affirmed, though I confess that I entertained at one time considerable doubt as to whether the prisoner was a bailee. It seems to me, however, that there is evidence that the prisoner was a bailee of the money. It is important to note that the sale was for cash, and that there was no usual course of dealing between the parties by virtue of which the prisoner had a right to mix the money he received with his own moneys, so that no specific money was his employer's . . . I think, then, that he was a bailee of the money within the statute, and that being so, there was ample evidence that he converted the money to his own use, and did so with felonious intent to appropriate it, for he kept the money and went away with it. I think, therefore, that the conviction can be supported.

48.

R. v. McDONALD.

(1885) 15 Q. B. D. 323 (C. C. R.).

An infant aged twenty obtained goods under a hire-purchase agreement and fraudulently converted them to his own use. *Held*, that he was guilty of larceny as a bailee under s. 3 of the Larceny Act, 1861 (*a*).

LORD COLERIDGE, C.J.—It is said that the prisoner cannot be convicted of larceny as a bailee, because being an infant

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(*a*) Now replaced by s. 1 (1) of the Larceny Act, 1916.

he was not competent to enter into a *contract* of bailment; that, the offence charged against him depended upon his having acted in a manner inconsistent with the terms of a contract, he being unable to enter into such a contract cannot be guilty of the offence. It seems to me that this contention is based upon an assumption which is not correct in law. It is not correct, as it appears to me, to use the expression "contract of bailment" in a sense which implies that every bailment must necessarily in itself be a contract. I do not so understand the definitions of the term "bailment." It is perfectly true that in almost all cases a contract either express or implied by law accompanies a bailment, but it seems to me that **there may be a complete bailment without the contract.** According to all the definitions, as, for instance, those given in Sir William Jones, Blackstone, and Kent's "Commentaries," 12th edit., p. 764, it would appear that **a bailment consists in the delivery of an article upon a condition or trust.** It is true, I know, that the authors of those various definitions go on to say that there is a promise or contract to restore the goods, but this is not, as it seems to me, the bailment itself, but a contract that arises out of it. It may be true that the prisoner in the present case could neither expressly nor impliedly promise to restore the goods, but nevertheless he had the goods delivered to him on a condition or trust and so delivered as to create in him a special property. That being so, he fraudulently appropriates them to his own use in a manner inconsistent with the special property so created. The third section of 24 & 25 Vict. c. 96 says in effect that a person who has obtained delivery of and a special property in goods, and who cannot therefore at common law be guilty of larceny of such goods, shall, if he fraudulently take or convert the same to his own use, be guilty of statutory larceny. It seems to me that undoubtedly the prisoner, though a minor, had the special property in or right of possession of these goods which was contemplated by those who framed this enactment when they used the term "bailee"; that having such special property he proceeded to abuse it and fraudulently to convert the goods to his own use; and that he is therefore guilty of the offence created by the section. He is guilty of the offence not because he has broken

a contract, which he was incapable of making, but because, being capable of becoming a bailee of these goods and having become one, he dealt with the goods in such a manner as by the terms of the Act to render him guilty of the crime of larceny.

49.

R. v. McKALE.

(1868) L. R. 1 C. C. R. 125.

A. and B. went into the shop of C. A. asked for a pennyworth of peppermints and put down a florin. C. gave as change a shilling, a sixpence, and five pennies, which A. took up. B. said to A., "You need not have changed," and put down a penny. A. took up the penny, put down a sixpence and six pennies, and said to C., "Give me a shilling for this." C. put a shilling on the counter. A. then said, "You had better give me the two-shilling piece and take it all." C. then took from her cash drawer the florin she had received from A. and put it on the counter, expecting to receive in exchange for it two shillings of A.'s money. A. took up the florin; C. took up the sixpence and six pennies put down by A. and her own shilling and was putting them into her cash drawer when she realized what had been done. At the same moment B. called away her attention by asking the price of something. A. then interrupted, saying to B., "You don't want that," and pushed B. out of the shop, so that both A. and B. left the shop before C. could correct her mistake. *Held*, that A. was guilty of larceny.

KELLY, C.B.—**The distinction between fraud and larceny is well established. In order to reduce the taking under such circumstances as in the present case from larceny to fraud the transaction must be complete. If the transaction is not complete, if the owner has not parted with the property in the thing, and the accused has taken it with a fraudulent intent, that amounts to larceny.** In this case the prisoner wishes to have back his two-shilling-piece, and is to give two shillings in money to Mrs. Pickering in exchange. She puts down the two-shilling-piece, expecting to receive two shillings of the prisoner's money. Did she part with the property in the two-shilling-piece by putting it down on the counter? It is clear that she did not. If the prisoner had taken it up immediately without giving the change, she would have stopped

him. The placing the two-shilling-piece on the counter was only a step in the transaction. Then the prisoner took up the two-shilling-piece. That cannot make the transaction complete, and does not affect the question. Mrs. Pickering next takes up the change. Is the mere taking up of the change a parting with the property in the two-shilling-piece? I am clearly of opinion that it is not. She is putting the change into the drawer when she sees she has only got a shilling of the prisoner's money. She takes up the money imagining it to be the whole change; but she corrects her error in a moment; and but for the act of the confederate she would have said, "You have only given me a shilling: give me the other shilling, or give me back the two-shilling-piece." Up to that time the transaction remained incomplete; and when the prisoner carried off the two-shilling-piece, he took something **the property in which had not passed out** of her, and calling away her attention by fraud quitted the shop. **He knew that it was her property and that he was taking it against her will, and consequently he was guilty of larceny. The whole question here is whether Mrs. Pickering had finally and completely and deliberately parted with her property; and I am of opinion that she had not, and that the prisoner was guilty of larceny.**

50.

R. v. BUCKMASTER.

(1888) 20 Q. B. D. 182 (C. C. R.).

B. was a bookmaker. At the Ascot Races he laid A. 7 to 1 against a horse, and A. deposited 5s. with him, expecting, if the horse won, to get back his own 5s. and 35s. in addition. During the race B. disappeared, but was subsequently discovered by A. on another part of Ascot Heath, when he denied all knowledge of the bet. *Held*, that B. was guilty of larceny by a trick.

Lord Coleridge, C.J.—The only question left to us by the case is whether there was any evidence to be left to the jury of larceny. I am of opinion that there was abundant evidence.

It was argued on behalf of the prisoner that the money was

intended to be parted with, that is, that the prosecutor intended to part with not only the possession of the money, but the **property** in the money, and consequently that the taking by the prisoner was not larceny but obtaining money by false pretences; if it was a crime at all, in other words, that it was false pretences or nothing.

To this contention there are two answers, both of them founded on good sense and supported by authority.

In the first place, supposing there was an intention on the part of the prosecutor to part with the property in the money, **in order to pass** that **property from the prosecutor to the prisoner there must be a contract,** that is, the bringing together of two minds, **but here there was nothing in the shape of a contract by which the property could pass,** for if the prosecutor meant to part with the money, it was on the terms that the prisoner should do something with it, that is, should return the money to the prosecutor if the horse won. But the prisoner did not do so and never intended to do so. The facts here are somewhat similar to those in *Oliver's Case* (*a*), where the prisoner offered to procure gold for the prosecutor in exchange for bank-notes, whereupon the prosecutor put down £35 in notes for the purpose of receiving back their amount in gold, and the prisoner took up the notes and went out of the house with them, promising to return immediately with the gold, but did not return. It was argued that the prosecutor intended to part with the property, but " Wood, B., held that the case clearly amounted to larceny, if the jury believed that the intention of the prisoner was to run away with the notes and never to return with the gold; and that whether the prisoner had, at the time, the *animus furandi* was the sole point on which the question turned; for if the prisoner had, at the time, the *animus furandi,* all that had been said respecting the property havng been parted with by the delivery was without foundation, as the property, in truth, had never been parted with at all. The learned Judge further said that **a parting with the property in goods could only be effected by contract, which required the**

(*a*) 2 Russell on Crimes, 169, 170, 5th ed., cited in *R.* v. *Walsh* (4 Taunt. at pp. 274, 275).

assent of two minds; but that in this case there was not the assent of the mind, either of the prosecutor or of the prisoner; the prosecutor only meaning to part with his notes on the faith of having gold in return; and the prisoner never meaning to barter, but to steal." That appears to me to be both good sense and sound law, and to be applicable to the present case, even assuming that there was here an intention to part with the property.

But, secondly, I think the true view is that the property in the money was not intended to pass to the prisoner.

In *R.* v. *Robson* (*b*) the circumstances were even more like those of the present case. There " the prosecutor was drawn in to deposit twenty guinea notes on a bet that one of the prisoners could not guess right three times successively on the hiding of a halfpenny by another of the prisoners under a pot; he put the notes in the hands of one of the prisoners, and then, the other guessing right, the notes were handed over. The question was left to the jury whether at the time the notes were taken there was not a plan between the prisoners that they should be kept under the false colour of winning a bet; and the jury so found. Upon a case reserved, the judges held that the conviction was right, because at **the time of the taking the prosecutor parted with the possession only"** (*c*). It was held there that the taking was felonious, because the parting with the money was obtained by fraud, and only the possession and not the property passed. Bayley, J., when reserving the case for the consideration of the judges, pointed out that at the time the prisoners took the prosecutor's notes, the latter parted with the possession only, not with the property; and that the property was only to pass eventually if Gill (the man with whom the prosecutor made the bet) *really* won the wager. The prosecutor expected to have been paid had Gill guessed wrong (*d*).

I am of opinion that the true view of the present case is exactly what was there stated. **Here the prosecutor deposited the money with the prisoner, not intending to part with the**

(*b*) MS. Bayley, J., R. & R. 413.
(*c*) 2 Russell on Crimes, 176.
(*d*) R. & R. 414.

property, for he was to have his money back in a certain event, whereas the prisoner when he received the money never intended to give it back in any event. It is true that the prosecutor would have been satisfied if he had received back, not the identical coins which he deposited, but other coins of equal value, but that does not show that he meant to part with his right to the money. In my opinion the evidence clearly shows that he meant to do nothing of the kind.

For these reasons I think the prisoner was properly convicted.

51.

R. v. RUSSETT.

[1892] 2 Q. B. 312 (C. C. R.).

The prosecutor went to a fair and met the prisoner, who offered to sell him a horse for £23, of which £8 was to be paid at once and the balance upon delivery of the horse. The prosecutor paid the £8 and received from the prisoner a receipt stating that the balance was to be paid upon delivery. The prisoner never delivered the horse to the prosecutor, but removed it from the fair in circumstances from which the jury inferred that he never intended to deliver it. *Held*, that he was guilty of larceny by a trick.

Lord Coleridge, C.J.—The principle which underlies the **distinction between larceny and false pretences** has been laid down over and over again. . . . When the question is approached it will be found that all the cases, with the possible exception of *Rex* v. *Harvey* (*a*), as to which there may be some slight doubt, are not only consistent with but are illustrations of the principle, which is shortly this. **If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, that is larceny.** This seems to me not only good law, but good sense, and this principle underlies all the cases. If, however, authority be wanted, it is to be found in two cases which we

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(*a*) 1 Leach 467.

could not overrule without the very strongest reason for so doing; the first is *Reg.* v. *McKale* (*b*), where Kelly, C.B., said: **"The distinction between fraud and larceny is well established. In order to reduce the taking under such circumstances as in the present case from larceny to fraud, the transaction must be complete. If the transaction is not complete, if the owner has not parted with the property in the thing, and the accused has taken it with a fraudulent intent, that amounts to larceny."** The distinction, in which I entirely concur, is there expressed in felicitous language by a very high authority. The other case is that of *R.* v. *Buckmaster* (*c*), which seems to me directly in point.

52.

R. v. EDWARD FISHER.

(1910) 103 L. T. 320.

Larceny by a trick. [The facts appear from the judgment.]

Judgment of the Court of Criminal Appeal, delivered by Darling, J.—In this case we regret that we feel ourselves compelled to decide that this conviction must be set aside. The facts appear to have been that the appellant took two old bicycles to the prosecutor and put them in for sale by auction at a certain reserve. By arrangement between the appellant and the man Sheen, the latter was to bid for the bicycles at the reserve price. This he did, but never paid the prosecutor, and the appellant, taking advantage of the practice of the prosecutor to pay the money out of his own pocket before he received it from the person to whom articles were knocked down, obtained payment of the £2. In these circumstances it has been contended on the appellant's behalf that he has been wrongly convicted of larceny, although he might have been convicted of some other offence. The Court thinks that the distinction between larceny, whether simple or by a trick,

(*b*) *Ante*, p. 111. (*c*) *Ante*, p. 112.

and false pretences is very clearly expressed by Lord Coleridge. C.J. in *R.* v. *Russett* (*a*).

[The learned Judge then read the judgment of Lord Coleridge, and contained—] It seems to us that, having regard to all the cases, the distinction between the two offences of larceny and false pretences is just the same now as formerly. In *R.* v. *Russett* (*supra*) Pollock, B., said "My mind has therefore been directed to the facts of the case in order to see whether the prosecutor parted with his money in the sense that he intended to part with the property in it. In my opinion he certainly did not." Looking at the facts of this case with the same object, the Court can only come to the conclusion that the prosecutor, through his clerk, did intend not only to part with the possession in the £2, but also with his property in that money. He may have been deceived as to the real dealing with the bicycles, but that is really immaterial so long as he intended to part with the property in the money, as we think he did. Therefore we cannot hold that this case is taken outside the rule laid down in *R.* v. *Russett*, and consequently that the offence committed was larceny by a trick, as it does not come within the rule defined by the passages quoted. The appeal must, therefore, be allowed.

53.

WHITEHORN BROTHERS v. DAVISON.

(1910) 80 L. J. K. B. 425.

Larceny by a trick. [The facts appear from the judgment.]

Buckley, L.J.—Now the first question upon which I am going to say something, although I do not think it is really necessary to decide it in this case, is whether there was in July, 1909, a larceny by a trick? In my opinion there was not. It seems to me that there is larceny by a trick where the facts are that the owner of goods, being induced thereto by

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(*a*) *Ante*, p. 115.

a trick, voluntarily parts with the possession of the goods, but does not intend to pass the property and the recipient has the *animus furandi*. And the same thing is true where the owner does not intend to pass the property to the particular person with whom he is in fact dealing—that is to say, where he is deceived as regards the identity of the person. On the other hand, goods are obtained by false pretences where the owner of the goods, being induced so to do by a trick, voluntarily parts with possession of the goods and does intend to pass the property.

The question which gives rise to some difficulty in the present case is this. **Suppose the facts are that the owner intends not to pass the property, but to confer a power to pass the property—under which head does that fall?** *Prima facie* **it would seem, inasmuch as he does not intend presently to pass the property, that that would be larceny by a trick. But I think that is not so. It seems to me that, where he intends to confer a power to pass the property, and no more, the case is only one of obtaining goods by false pretences. In my opinion, then, it is obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession and does intend to pass the property or does intend to confer a power to pass the property.** If he gives, and intends to give, the power, and the power is exercised, the person who takes under the execution of the power obtains the property not against, but by the authority of, the original owner, and none the less because the authority was obtained by fraud. One may put the same thing in a different way. A man can steal a particular chattel, but he cannot steal the power to dispose of a chattel. A man can obtain the grant of a power of attorney by fraud, but he cannot steal a power of attorney. The fact is that every creation of a power is the creation of a contractual right. You cannot steal a contract—you can only steal a chattel.

The transaction in the present case was this. On July 31, 1909, the plaintiffs, the true owners of the goods, sent the goods to Bruford on sale or return, and the evidence shows that they were not then intending to pass the property to him, but they were intending to hand him possession of the goods

knowing that he had or believing that he had (he told them that he had, which was false) a customer who wanted to buy them. The plaintiffs were giving Bruford authority to hand over the goods and to pass the property in the goods to that supposed customer. They were sending him the goods on approbation, and they were making him this offer: You may have possession of these goods, and if you are so minded you may pass the property in these goods to the customer you tell us you have. It was therefore such a case as I have described as one where the owner voluntarily parts with the possession of the goods and intends to confer a power to pass the property. That, being induced by Bruford's fraud, is in my opinion not larceny by a trick on his part, but is obtaining goods by false pretences.

54.

R. v. McGRATH.

(1870) L. R. 1 C. C. R. 205.

Jane Powell went into a sale room where a mock auction was being held by the prisoner. A piece of cloth was put up for sale, and a confederate of the prisoner asserted that Mrs. Powell had bid 26s. for it. The prisoner thereupon knocked it down to her, and on her denial that she had bid and refusal to pay she was told that she would not be allowed to leave until she had paid. Being afraid, she then paid the 26s. *Held*, that the prisoner was guilty of larceny.

KELLY, C. B.—I think the conviction ought to be affirmed. The prisoner acted as, and professed to be, an auctioneer. There was a bid for the piece of cloth, and it was knocked down, or at least the prisoner pretended to knock it down to Jane Powell. An altercation then arose. Jane Powell said the cloth was not knocked down to her, and that she had not bid for it. The prisoner knew that this was so, but pretended that she had made a bid for the cloth. He went up to her and intimidated her, for she says in her evidence that she was afraid of him. She was told that she should not leave the room unless she paid for the cloth. **In consequence of being**

thus frightened by the prisoner and of his threat that she should not leave the room, she paid the money. The meaning of the finding of the jury must be taken to be that she did not pay the money voluntarily. She was induced to do so by subterfuge, and also by a threat of what might have amounted to personal violence. Under these circumstances **she parted with the money against her will.** The question is, whether on these facts the prisoner was properly convicted of larceny.

There are several definitions of larceny. Bracton (lib. 3, c. 32) defines it thus: "*Furtum est contrectatio rei alienæ fraudulenta cum animo furandi invito illo cujus res illa fuerit.*" In modern times W. East (2 East P. C. 553) has defined larceny to be "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another with a felonious intent to convert them to his (the taker's) own use, and make them his own property without the consent of the owner." The latter definition has been adopted by Parke, B. (*a*), and other judges of high authority. The Criminal Law Commissioners thus define larceny: "Theft is the wrongfully obtaining possession of any moveable thing which is the property of some other person, and of some value, with the fraudulent intent entirely to deprive him of such thing, and have a deal with it as the property of some person, other than the owner," ("Cr. L. Com.," 1845—9, 3rd rep.). This case comes exactly within this definition, as the money was taken against the will of the owner. Jane Powell did not part with it voluntarily, but the possession was obtained by fraud and force. **Both these causes operated on her mind. The crime of obtaining money by false pretences differs from larceny. It is constituted by the pretence that something has taken place which, in fact, has not taken place. The present is a different case. Jane Powell was not deceived. She was intimidated, and by the operation of both the intimidation and the surprise at the trick she was induced to give up her money against her will.** It is not necessary to consider whether there was sufficient force used to constitute a robbery. If there was such force then the prisoner was properly convicted

(*a*) *R.* v. *Holloway*, 1 Dea. C. C. at p. 375.

of larcery, which is included in the crime of robbery. All the elements of larceny would then be present.

55.

R. v. THURBORN.

(1849) 2 C. & K. 831.

T. was indicted for stealing a bank-note. He found the note, which had been accidentally dropped, on the high road. There was no name or mark on it indicating the owner, nor were there any circumstances which would enable him to discover to whom the note belonged, nor had he any reason to believe that the owner knew where to find it. He meant to appropriate it to his own use after he picked it up. The day after he was informed that the prosecutor was the owner and had dropped it accidentally. He then changed it and appropriated the money to his own use. *Held*, that H. was not guilty of larceny.

PARKE, B.—**To prevent . . . the taking of goods from being larceny, it is essential that they should be presumably lost,** that is, that they should be taken in such place and under such circumstances as that the owner would be reasonably presumed by the taker to have abandoned them, or at least not to know where to find them. Therefore, if a horse is found feeding on an open common or on the side of a public road, or a watch found, apparently hidden, in a hay-stack, the taking of these would be larceny, because the taker had no right to presume that the owner did not know where to find them, and, consequently, had no right to treat them as lost goods. In the present case, there is no doubt that the banknote was lost, the owner did not know where to find it, the prisoner reasonably believed it to be lost, he had no reason to know to whom it belonged, and therefore, though he took it with the intent, not of taking a partial or temporary, but the entire dominion over it, the act of taking did not, in our opinion, constitute the crime of larceny. Whether the subsequent appropriation to his own use by changing it with the knowledge at that time that it belonged to the prosecutor

does not amount to that crime, will be afterwards considered. It appears, however, that **goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted so as to constitute the crime of larceny, where the party finding may be presumed to know the owner of them, or there is any mark upon them presumably known by him by which the owner can be ascertained.** There are many reported cases on this subject—some where the owner of the goods may be presumed to be known from the circumstances under which they are found. Amongst these may be mentioned the cases of articles left in hackney-coaches by passengers, which the coachman appropriates to his own use; or a pocket book found in a coat sent to a tailor to be repaired and abstracted and opened by him. In these cases the appropriation has been held to be larceny. Perhaps these cases might be classed among those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or derelict. . . . The appropriation of goods by the finder has also been always held to be larceny where the owner could be found out by some mark on them, as in the case of lost notes, cheques, or bills with the owner's name upon them. . . . The result of these authorities is that the rule of law on this subject seems to be that **if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire domain over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. But, if he has taken them with like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. . . .** To apply these rules to the present case:—The first taking did not amount to larceny, because the note was really lost, and there was no mark on it, nor other circumstances, to indicate then who was the owner or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found; and

therefore **the original taking was not felonious**; and if the prisoner had changed the note or otherwise disposed of it before notice of the title to the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note the owner became known to him, and he then appropriated it *animo furandi*; and the point to be decided is, whether that was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner; for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense and the question is, does that make a difference? We think not. It was dispunishable, as we have clearly decided; and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner; **and the subsequent conversion was not** therefore **a trespass** in this case more than the others, and consequently no larceny. We therefore think the conviction was wrong.

56.

R. v. KERR.

(1837) 8 C. & P. 176.

Rebecca Kerr was a nurserymaid who found (or said she found) four £5 notes belonging to her master in the passage of her master's house. She made no inquiry of her master whether the notes were his or not, but appropriated them and took them away from the house. *Held*, that she was guilty of larceny.

PARK, J.—It is suggested that this is not a felony, because the prisoner might have found the notes in the passage. What passage? Why, the passage of her master's house. What! if I drop a ring is my servant to take it away? The learned counsel has done me the honour to quote a decision of mine in a case on the Oxford Circuit. But there are many

decisions of other judges on the subject. There was a case where a pocket-book containing bank-notes was found by a person in the highway, and converted by him to his own use; and Mr. Justice Lawrence there lays it down, that if the party finding property in such a manner knows the owner of it, or if there be any mark upon it by which the owner can be ascertained, and the party, instead of restoring it, converts it to his own use, such converting will constitute felonious taking. In the present case there was no necessity for the prisoner to keep the property till it was advertised; for as she found it in her master's passage she could have ascertained whether it was her master's; at least she should have asked him the question. There was a very remarkable case upon this subject before Lord Eldon when Lord Chancellor in which 900 guineas were concealed in a bureau, which was sent to the East Indies, and brought back again to England without the contents being discovered; and a person purchased the bureau, and delivered it to a carpenter to repair it. The money being discovered the carpenter and his wife and another person secreted it. A bill was filed against them, and they demurred to it, on the ground that an answer might subject them to criminal punishment; and Lord Eldon, after looking into the cases and consulting some of the judges, was clearly of opinion that it was a felony (*a*).

57.

SOUTH STAFFORDSHIRE WATER COMPANY v. SHARMAN.

[1896] 2 Q. B. 45.

A workman employed to clean out the plaintiffs' reservoir found two gold rings in it. *Held*, that the rings were in the possession of the plaintiffs, who were therefore entitled to recover them from the workman.

Lord Russell of Killowen, C.J.—The case raises an interesting question. The action was in detinue to recover

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(*a*) *Cartwright* v. *Green*, 8 Ves. 435; 2 Leach 532.

the possession of two gold rings from the defendant. The defendant did not deny that he had possession of the rings but he denied the plaintiffs' title to recover them from him. Under those circumstances the burden of proof is cast upon the plaintiffs to make out that they have, as against the defendant, the right to the possession of the rings. Now the plaintiffs under a conveyance from the corporation of Lichfield are the owners in fee simple of some land in which is situate a pool known as the Minster pool. For purposes of their own the plaintiffs employed the defendant, among others, to clean out that pool. In the course of that operation several articles of interest were found, and amongst others the two gold rings in question were found by the defendant in the mud at the bottom of the pool.

The plaintiffs are the freeholders of the *locus in quo* and as such they have the right to forbid anybody coming on their land or in any way interfering; they had the right to say that their pool should be cleaned out in any way they thought fit and to direct what should be done with anything found in the pool in the course of such cleaning out. It is no doubt right, as the counsel for the defendant contended, to say that the plaintiffs must show that they had actual control over the *locus in quo* and the things in it; but under the circumstances can it be said that the Minster pool and whatever might be in that pool were not under the control of the plaintiffs? In my opinion they were. The case is like the case in which several illustrations were put in the course of the argument, where an article is found on private property, although the owners of that property are ignorant that it is there. The principle on which this case must be decided, and the distinction which must be drawn between this case and that of *Bridges* v. *Hawkesworth* (*a*), is to be found in a passage in Pollock & Wright's "Essay on Possession in the Common Law," p. 41: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the

(*a*) 21 L. J. Q. B. 75.

right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. . . . It is free to anyone who requires a specific intention as part of a *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent to exclude unauthorized interference."

That is the ground on which I prefer to base my judgment. There is a broad distinction between this case and those cited from Blackstone. Those were cases in which a thing was cast into a public place or into the sea—into a place, in fact, of which it could not be said that anyone had a real *de facto* possession, or a general power and intent to exclude unauthorized interference.

The case of *Bridges* v. *Hawkesworth* stands by itself and on special grounds; and on those grounds it seems to me that the decision in that case was right. Someone had accidentally dropped a bundle of bank-notes in a public shop. The shopkeeper did not know they had been dropped, and did not in any sense exercise control over them. The shop was open to the public, and they were invited to come there. A customer picked up the notes and gave them to the shopkeeper in order that he might advertise them. The owner of the notes was not found, and the finder then sought to recover them from the shopkeeper. It was held that he was entitled to do so, the ground of the decision being, as was pointed out by Patteson, J., that the notes, being dropped in the public part of the shop, were never in the custody of the shopkeeper, or " within the protection of his house."

It is somewhat strange that there is no more direct authority on the question; but the general principle seems to me to be that **where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo.**

53.

R. v. SHICKLE.

(1869) L. R. 1 C. C. R. 158.

S. was indicted for stealing eleven partridges. The birds had been reared from eggs taken from the nest of a wild partridge and hatched by a common hen. At the time when they were stolen the partridges were three weeks old and were still running with the hen and sleeping under her wings at night, though when older they would have taken to the woods and would not then have differed from birds reared under a wild hen. *Held*, that at the time of taking they were the subject of larceny.

Bovill, C.J.—I am of opinion that, upon the facts stated, the question asked of us must be answered in the affirmative and that the conviction is right. The case states that "from their inability to escape, they were practically in the power and dominion of the prosecutor." That is sufficient to decide the point. In *R.* v. *Cory* (*a*) the law on the subject is very clearly laid down by my Brother Channell. He there says, speaking of pheasants hatched under circumstances similar to those here: "**These pheasants,** having been hatched by hens, and reared in a coop, **were tame pheasants at the time they were taken,** whatever might be their destiny afterwards. **Being thus, the prosecutor had such a property in them that they would become the subject of larceny** and the inquiry for stealing them would be of precisely the same nature as if the birds had been common fowls or any other poultry, the character of the birds in no way affecting the law of the case but only the question of identity." In that statement of the law we all concur. The question here is were these birds the subject of property? They were so when first hatched and they remain so at the time they were taken by the prisoner, though it might be that at a later period they would become wild and cease to have an owner. The prisoner therefore was rightly convicted.

Byles, J.—I am of the same opinion. The usual cases of larceny of animals are those of animals which, being at first

(*a*) 10 Cox C. C. 23.

wild, have become tame and reclaimed. In this case the only difference is that the birds here are tame and have been so from their birth, though they may become wild at a future time.

59.

R. v. TOWNLEY.

(1870) L. R. 1 C. C. R. 315.

The prisoner was one of several poachers who wrongfully killed rabbits on Crown land. The dead rabbits were hidden in a ditch on the same land until the poachers could return and take them away. About three hours later the prisoner returned and began to take away the rabbits. *Held*, that the whole transaction was a continuous one and that the removal of the rabbits was not larceny.

MARTIN, B.—I think it is of the utmost importance that the criminal law should rest upon plain and simple principles. Now, if a man kills a rabbit and carries it away at once it is clearly not larceny. But it is said that if he leaves it for a little time before carrying it away it is. And in support of this view a passage from Hale's "Pleas of the Crown," p. 510, is relied on, where he says, "If a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time or so come and fetch it away this hath been held felony, because the act is not continuated but interpolated, and so it was agreed by the Court of King's Bench, 9 Car. 2, upon an indictment for stealing the lead of Westminster Abbey."

A dictum of Gibbs, C.J., in *Lee* v. *Risdon* (*a*) to the same effect is also cited. Those statements may be perfectly correct, and ought perhaps to be followed in cases exactly similar in their facts, where there has been an actual abandonment of possession of the things taken. But **here it is expressly found that there was no abandonment. And where the act is merely interrupted I think it more reasonable to hold that there is no larceny.**

(*a*) 7 Taunt. at p. 191.

Bramwell, J.—And I think our decision is consistent with the passage cited from Hale and the dictum of Gibbs, C.J., referred to, which appear to me quite correct. If a man were unlawfully to dig his neighbour's potatoes, and from being disturbed in his work or any other cause, were to abandon them at the place where he had dug them, and were afterwards with a *fresh intention* to come back and take them away, I think the case would be the same as if during this interval of time the potatoes had been locked in a cupboard by the true owner. Wherever, in such cases, the goods may be said to have been in the possession of the true owner in the interval between the severance and the removal, I think the removal is larceny. But is that so in this case? If the poachers had taken these rabbits to their own house, or to a public-house, can it be supposed that the subsequent removal of them from there would have been larceny? And if the case be varied by supposing them to have placed them upon land adjoining that on which they were killed, can that make any difference? And if so, how can it be otherwise because the place of deposit chosen is upon the land of the same owner on whose grounds the rabbits were killed? The case seems to me not to fall within the rule laid down by Hale, for, to use his words, the act here was "continuated."

Blackburn, J.—If we are to understand these passages in the sense put upon them by my Brother Bramwell, as applying only to a case in which the wrongdoer has abandoned and lost all property and possession in the things in question, I have no quarrel with them, and they do not apply to the present case. But if those passages mean that the mere cessation of physical possession is sufficient to make the subsequent act of removal larceny, then they do apply to the present case. And in that case, great as is my respect for Lord Hale, I cannot follow him. I cannot see that it makes any difference whether those who have taken game hide it in one place or hide it in another.

60.

R. v. GNOSIL.

(1824) 1 C. & P. 304.

The prisoner was indicted for a highway robbery. The prosecutor proved, that as he was going along the street of Walsall, the prisoner laid hold of his watch and chain, and with considerable force jerked his watch from his pocket; a scuffle ensued and the prisoner was secured.

Garrow, B.—The mere act of taking, being forcible, will not make this offence a highway robbery: **to constitute the crime of highway robbery, the force used must be either before or at the time of the taking, and must be of such a nature as to show that it was intended to overpower the party robbed and prevent his resisting, and not merely to get possession of the property stolen.** Thus, if a man walking after a woman in the street were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery; because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property.

61.

R. v. JAMES LAPIER.

(1784) 1 Leach, 320.

James Lapier was indicted for assaulting Albina Hobart, and taking from her person violently, and against her will, one gold ear-ring set with diamonds, value £150, the property of her husband, George Hobart, Esq.

Mrs. Hobart was retiring from the Opera House towards her carriage, which had drawn up close to the pavement of the street to receive her. Whilst she was preparing to step in she felt a person, who was proved to be the prisoner, take hold of her ear, and pull her ear-ring as if endeavouring to pull it off. Her ear by this violence was torn entirely through; the ear-ring separated from the ear; and Mrs. Hobart conceived it had been taken away, but on her arrival at home it was found amongst the curls of her hair.

There was no proof that the ear-ring was even seen in the prisoner's hand, but his hand was seen elevated to her ear, and at that instant Mrs. Hobart exclaimed, "I have lost my ear-ring."

MR. BARON PERRYN, to the jury.—**Robbery is only an aggravated species of larceny;** and to constitute a larceny, it is essential that there should not only be a taking, but a carrying away. The taking in the present case is very clearly proved, for the ear-ring was completely separated from the ear, but it seems questionable whether there has been a sufficient carrying away. A number of cases have been decided upon this subject; two of them have come before Lord Mansfield since I have been upon the Bench. One of them was a case reserved by Mr. Justice Nares. A man got into a waggon where there was a bale of goods which lay in a horizontal posture. He raised it perpendicularly on its end, and while he was taking the contents of it out he was detected by the waggoner. The judges were of opinion that as the property had not been removed from the place where it at first laid, there was not a sufficient carrying away, for a carrying away in order to constitute felony must be a removal of the goods from the place where they were, and the felon must for the instant at least have the entire and absolute possession of them (*a*). The other case was reserved by myself. The Uxbridge waggon was passing along Oxford Street; and at a grocer's door a parcel of sugar or other grocery was taken up and put into the waggon. The prisoner got into the waggon, and had removed this parcel from the head of the waggon, where it had been originally placed, to the tail of it; but he was apprehended before he had got it out of the waggon. The judges held that

(*a*) In the conference on this case, Mr. Baron Eyre mentioned a case before him, where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter; a thief took up the goods and carried them away towards the door as far as the string would permit, and this he held not to be a severance, and, consequently, no felony; 2 East P. C. 556. And the principle of this opinion was recognized in *Wilkinson's Case*, 1 Hale, 508, where one had his keys tied to the strings of his purse in his pocket, which the prisoner attempted to take from him, and was detected with the purse in his hand, but the strings of the purse still hung to the owner's pocket by means of the keys, and this was ruled to be no asportation; for the purse could not be said to be carried away, as it still remained fastened to the place where it was before.

this was a sufficient taking and carrying away to constitute the offence (*b*).

The jury found the prisoner guilty, but the judgment was respited, and the case submitted to the consideration of the twelve judges.

The judges were all of opinion, that it was a sufficient taking away from the person to constitute robbery; for it being in the possession of the prisoner for a moment, **separate from the lady's person,** was sufficient, although he could not retain it, but probably lost it again the same instant: and it was taken by violence.

62.

R. v. VILLENSKY.

[1892] 2 Q. B. 597 (C. C. R.).

A. and B. were indicted for feloniously receiving stolen goods (*a*), the property of C. P. and Co. The goods were in a parcel delivered to C. P. & Co. for carriage to Holloway. When the parcel arrived at the depôt of C. P. & Co. it was, with other parcels, unloaded from the collecting van. The actual thief was Clark, a servant of C. P. & Co., who removed the parcel from the part of the platform appropriated to Holloway parcels to the part appropriated to Spitalfields parcels and addressed it to A. and B. at Spitalfields. The conduct of Clark was seen by a fellow-servant and reported to a superintendent. The superintendent inspected and replaced the parcel and ordered that it should be sent by special delivery to A. and B. The parcel was accordingly sent and received by A. and B. under circumstances showing that they knew it had been stolen. *Held*, by the Court for Crown Cases Reserved, that as C. P. & Co., in whom the property in the goods was laid by the indictment, had

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(*b*) At the Lent Assizes for Cambridge, 16 Car. II., Clement Simpson was indicted on 39 Eliz. c. 15, for stealing in the dwelling-house. A special verdict was found, that he had taken plate out of a trunk, and laid it on the floor, but was apprehended before he had carried it away; and all the Judges were of opinion that taking goods and removing them from one place to another in the same house, with an intent to steal them, is felony, for by the taking he hath the possession. Kelynge, 31 Bro. Cor. 107; 1 Hale 358, 508; Foster 109.

(*a*) "Every person who receives any property knowing the same to have been stolen *or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour*, shall be guilty of an offence of the like degree," Larceny Act, 1916, s. 33 (1).

resumed possession of the parcel before its receipt by the prisoners it had then ceased to be stolen property and A. and B. could not be convicted of receiving.

Lord Coleridge, C.J.—This is in my opinion a perfectly plain case. . . . There is no doubt that Clark stole these goods and the other two prisoners intended to receive them; but the carriers, in whose name those responsible for the prosecution insisted on the case going on, had in the meantime, before its receipt by the prisoners, got hold of the property, which, by their special directions, was sent off to the prisoners' house in a special van accompanied by two detectives. I must confess that I cannot conceive of a case of resumption of possession if this is not one.

A. L. Smith, L.J.—I am of the same opinion. The prisoners have been convicted of receiving stolen property knowing it to have been stolen, and **the only question for us is whether, at the time they received it, it was stolen property.** There is no doubt that Clark stole it; but after the theft the carriers resumed possession of the property, and delivered it to the persons who had been convicted of receiving it. . . . I think it clear that possession of the stolen property was resumed by the carriers.

63.

R. v. SCHAMA; R. v. ABRAMOVITCH.

(1914) 84 L. J. K. B. 396.

Recent possession—Onus of proof. [The facts are not material.]

Judgment of the Court of Criminal Appeal delivered by Lord Reading, C.J., who, after stating the facts, continued:—The only question, . . . which we have to consider is whether the Judge who tried the case gave a proper direction to the jury. It is necessary to be very careful in cases of this character, because, in some of the many cases of a similar kind which have come before this Court since it was constituted, language has been used by the Judge in stating the principle of law by

which the jury must be guided which is not quite accurate. The jury have to determine the facts for themselves, and must accept from the presiding Judge the principle upon which they must adjudicate. In a case, such as the present, where a charge is made against a person of receiving stolen goods well knowing the same to have been stolen, when the prosecution have proved that the person charged was in possession of the goods and that they had been recently stolen, the jury should then be told that they may, not that they must, in the absence of any explanation which may reasonably be true, convict the prisoner. But **if an explanation has been given by the accused, then it is for the jury to say whether upon the whole of the evidence they are satisfied that the prisoner is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted,** inasmuch as the Crown would then have failed to discharge the burden imposed on it by our law of satisfying the jury beyond reasonable doubt of the guilt of the prisoner. **The onus of proof is never changed in these cases: it always remains on the prosecution.** That is the law. In pronouncing it to be so, the Court is not giving forth any new statement of the law, but is merely re-stating it; and it is hoped that this re-statement may be of assistance to those who have to try these cases. The question we have to decide on the present appeal is whether the learned Judge gave a direction in accordance with the principle of law just stated. One must not be too critical of the language used by a Judge in directing a jury after a somewhat lengthy trial when there have been speeches by counsel for the defence as well as for the prosecution, particularly when the counsel engaged are very familiar with this class of case and with the administration of the criminal law, but at the same time this Court must be satisfied that the jury, in returning a verdict of guilty, have applied the right principle of law to the facts of the case before them. It was contended by counsel for the appellant Schama, and his argument was adopted by counsel for the other appellant, that in this case the Judge had made it appear to the jury that once it was proved that the goods had been

recently stolen the burden of proof was shifted from the prosecution to the defence, and that it was then upon the accused to satisfy the jury that they had a reasonable explanation to offer, or that they had acted honestly in dealing with the goods which had been stolen. When one looks at the passages in the summing-up which have been criticised it does appear that it was never put to the jury that, if they were satisfied that the explanation given by the appellants might reasonably be true, the Crown would not have established beyond reasonable doubt that the prisoners were guilty. This Court, looking by no means minutely or miscroscopically at the summing-up, cannot find any statement of that principle of law, and it appears to us as if the jury must have come to the conclusion that, when once the Crown had established that the goods had been recently stolen and were in the possession of the prisoners, it was for them to satisfy the jury that the explanation they had given of the goods being in their possession was true. If that is the effect of the words used by the learned Judge, it would be a wrong direction in law to the jury. We have come to the conclusion that we cannot say that the learned Judge in this case gave a proper direction to the jury, inasmuch as he failed to put the point specifically before them, with the result, it may be, that the jury never considered that they could and ought to acquit the prisoners, if they thought that the explanation given by them might be true, although they were not satisfied that it was. That being so, in the ordinary course of things these convictions would be quashed. It was said, however, by counsel for the Crown that under s. 4 of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), this Court ought not to quash the convictions, inasmuch as no miscarriage of justice had taken place, notwithstanding that this Court might take the view that the learned Judge had given a wrong direction in law. We have said again and again that the principle to be applied in cases of this character, where the Court has come to the conclusion that there has been some misdirection in law, is that the Court will not interfere with the verdict if it is satisfied that the jury must have come to the same conclusion upon a proper direction on the law. If

the Court, however, comes to the conclusion that upon a proper direction the jury might have come to the same conclusion, but not that they must have come to it, the Court must then give effect to the view that the jury may have been induced to find their verdict in consequence of misdirection by the learned Judge, and must allow the appeal. In the present case the Court is unable to say that, if the jury had been properly directed, they must have found the appellants guilty; and that being so, the Court is of opinion that the convictions of these two men must be quashed.

64.

R. v. NEGUS.

(1873) L. R. 2 C. C. R. 34.

N. was engaged by B. to solicit orders for him and was to be paid by a commission on money received by his means. He had no authority to receive money and was bound to hand over to B. all money received. Contrary to his duty he applied for payment of £17 and having received it applied it to his own use. *Held*, that N. was not a "clerk or servant" within s. 68 of the Larceny Act, 1861 (*a*), and could not be convicted of embezzlement.

BOVILL, C.J.—The only question submitted to us is whether, on the facts stated, the prisoner was a "clerk or servant" and as such rightly convicted of embezzlement. The learned assistant judge of the Court directed the jury to find the prisoner guilty, subject to this point being raised.

Generally speaking, I should say that the question whether a person is a clerk or servant depends on so many considerations that it is one to be left to the jury, as it is extremely difficult for the Court to come to a satisfactory conclusion upon such a matter. Much depends on the nature of the occupation

(*a*) Now replaced by s. 17 of the Larceny Act, 1916, which is as follows: "Every person who, being a clerk or servant or person employed in the capacity of a clerk or servant . . . fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer . . . shall be guilty of felony."

in which the individual is engaged, and the kind of employment. But we have to see if there was enough evidence to show that the prisoner here was a clerk or servant. I think that that fact is not sufficiently made out. **What is a test as to the relationship of master and servant? A test used in many cases is, to ascertain whether the prisoner was bound to obey the orders of his employer so as to be under his employer's control;** and on the case stated there does not seem sufficient to show that he was subject to the employers' orders, and bound to devote his time as they should direct. Although under this engagement with them, it appears he was still at liberty to take orders, or to abstain from doing so, and the masters had no power to control him in that respect. Where there is a salary, that raises a presumption that the person receiving it is bound to devote his time to the service, but when money is paid by commission a difficulty arises, although the relationship may still exist where commission is paid, as in ordinary cases of a traveller, and in *R.* v. *Site* (*b*) and the other case cited. But in either case there may be no such control, and then the relationship does not exist. All the authorities referred to seem to show that **it is not necessary that there should be a payment by salary—for commission will do—nor that the whole time should be employed, nor that the employment should be permanent,**—for it may be only occasional, or in a single instance—if at the time, the prisoner is engaged as servant. The facts before us do not make out what the prosecution was bound to prove, viz., that the prisoner was clerk or servant.

Blackburn, J.—I am of the same opinion. The test is very much this, viz., whether the person charged is **under the control and bound to obey the orders of his master.** He may be so without being bound to devote his whole time to this service; but if found to devote his whole time to it, that would be very strong evidence of his being under control. This case differs in nothing from the ordinary one of a commission agency, except in the sole statement that the prisoner was not to work for others. But I do not think that

(*b*) L. & C. 29.

circumstance by itself alone enables us to say that he was a servant of the prosecutor.

65.

R. v. BOWERS.

(1866) L. R. 1 C. C. R. 41.

B. entered into an agreement with A. by which he was to become the agent or traveller of A. for the sale of coals, receiving one guinea per week as salary and one shilling per ton as commission on all coals sold by him. B. was to collect all money due for coals sold by him and was not to keep any money collected in his possession more than one week after its receipt. A. was to have the use of B.'s office without charge. The agreement might be terminated by a month's notice on either side. At a later date B. wished to sell coal on his own account and A. consented to supply him with coal for that purpose, ceasing to pay him a salary, but allowing him a commission on the sale of coal supplied.

Under this agreement B. accounted to A. monthly, reporting all payments made by purchasers of the coal supplied by A., the invoices for which were made out in the name of A.'s firm, and paying over to A. the surplus beyond his commission. B. failed to report payments by three of such purchasers and represented their accounts as still unpaid. *Held*, that B. was not a clerk or servant of A. within s. 68 of the Larceny Act, 1861, and could not be convicted of embezzlement.

Erle, C.J.—We are all of opinion that this conviction must be quashed. The facts stated fall within the cases cited by Mr. Collins, which decide that **a person who is employed to get orders and receive money, but who is at liberty to get those orders and receive that money where and when he thinks proper, is not a clerk or servant, within the meaning of the statute.** The construction of the documents decides this case. Under the first agreement the prisoner was a servant; but under the second he was at liberty to dispose of his time in the way he thought best, and to get or to abstain from getting orders on any particular day as he might choose; and this state of things is inconsistent with the relation of master and servant.

66.

R. v. MASTERS.

(1848) 2 C. & K. 930.

M. was tried at the Quarter Sessions on an indictment, which charged that he, being a servant of William Holliday, embezzled three several sums received by him, by virtue of his employment, for and on account of his master. The prisoner was convicted subject to the opinion of the judges on a case, which stated as follows:—

"The course of business adopted by the prosecutor's house was for the customers to pay moneys into the hands of certain persons, who paid them over to a superintendent; he accounted with the prisoner, and paid over such moneys to him, and the prisoner, in his turn, accounted with cashiers, and paid over the moneys to them, he having no other duty to perform with respect to such moneys than to keep an account which might act as a check on the superintendent and the cashiers, their accounts being in like manner checks upon him. These four parties to the receipt of the moneys were all servants of the prosecutor. With respect to the three sums in question, it was proved that they passed in due course from the customers, through the hands of the intermediate receivers and the superintendent, to the prisoner, who wilfully and fraudulently retained them."

POLLOCK, C.B.—We are all of opinion that the conviction is right. We think that the case of *R.* v. *Murray* (*a*) is distinguishable from the present. There the prisoner had received the prosecutor's money from another of his clerks, to apply for a particular purpose, and he appropriated it to his own use; and that was not an embezzlement within the statute. **Here the money was** really **on its way to the**

(*a*) 5 C. & P. 146; 1 Moo. C. C. 276. Indictment for embezzlement. The prisoner was a clerk in the employ of A. He received from another clerk £3 of A.'s money in order that he might pay for an advertisement in the *Gazette*. He paid £1 for the advertisement and charged A. £2 0s. 6d., keeping the difference, which he converted to his own use. On a case reserved all the judges were of opinion that this was not embezzlement because A. had had the possession of the money by the hands of the other clerk. The offence was therefore larceny. Similarly in *R.* v. *Beaman* (1 C. & M. 595) a servant was sent with 6s. to buy coal; he spent 5s. on coal and appropriated 1s. *Held*, that he was guilty of larceny. **In embezzlement the thing is appropriated while in the possession of the clerk or servant and before it has come to the possession of the master. In larceny the thing taken is only in the custody of the clerk or servant and is taken out of the possession of the master,** see *R.* v. *Charles Jones*, *ante*, p 88, and *R.* v. *Cooke*, *ante*, p. 91.

master, and the prisoner was one of those who was to receive the money on account of his master, and he embezzled it before it got to the master.

67.

R. v. CULLUM.

(1873) L. R. 2 C. C. R. 28.

C. was employed by B. as captain of one of his barges and was remunerated by half the net earnings of the barge. His duty was to take the barge to London and bring back such cargo as B. should direct; he had no authority to take any cargo other than that directed by B. In one voyage he was given directions to bring back a certain cargo and was expressly forbidden to carry a cargo of manure to a Mr. Pye at Caxton. In disobedience to his orders he did carry the manure to Pye, but denied having done so and failed to account for £4 which Pye paid as freight. Pye contracted solely with C. and knew nothing about B. *Held*, that C. could not be convicted of embezzlement.

Bovill, C.J.—In the former Act relating to this offence were the words "by virtue of his employment." The phrase led to some difficulty. . . . Therefore in the present statute (*a*) those words are left out; and s. 68 requires instead that, in order to constitute the crime of embezzlement by a clerk or servant the "chattel, money, or valuable security . . . shall be delivered to, or received, or taken into possession by him, for or in the name or on account of his master or employer."

Those words are essential to the definition of the crime of embezzlement under that section. **The prisoner here, contrary to his master's order, used the barge for his, the servant's own purposes, and so earned money which was paid to him not for his master, but for himself;** and it is expressly stated that there was no proof that he professed to carry for the master, and that the hirer at the time of paying the money did not know for whom he paid it. The facts before us would seem more consistent with the notion that the

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(*a*) Larceny Act, 1861. See *Note*, *ante*, p. 136.

prisoner was misusing his master's property, and so earning money for himself, and not for his master. Under those circumstances the money would not be received "for" or "in the name of" or "on account of" his master, but for himself, in his own name, and for his own account. His act, therefore, does not come within the terms of the statute, and the conviction must be quashed.

BLACKBURN, J.—I am also of opinion that this conviction cannot be supported. Without criticizing the words of the Act, let us look at the object of passing it. The common law requires for the offence of larceny, not only *animus furandi*, but there should be a taking, and it was held, on the narrow distinctions of the common law, that when the property only became the master's by coming into the hands of his servant and not otherwise, the servant could not be said to take his master's property because it came into his hands at the moment it was so received.

It was to meet this difficulty that the Legislature said, "He who embezzles shall be guilty of stealing although the property has not become the master's except by the possession of the servant"; and in the original Act were the words "by virtue of his employment" which have been expressly omitted from the more recent statute; yet still the essence of the matter is, that the servant shall be deemed to have stolen the master's property, if it be his master's property although not received otherwise than in the prisoner's capacity of clerk or servant. That is, I take it, the key to the meaning of the whole enactment, the technical objection as to the possession is removed. Therefore, I think the opinion expressed by Mr. Davis, in his edition of these Acts (*b*), that "it still **must be the master's money which is received by the servant**," is correct enough, although the context, "and not money wrongfully received by the servant by means of false pretences or otherwise," is not quite accurate, because it may be received for the master although obtained by false pretences. Now in the present case I cannot see how this was the master's property, or that the servant had authority to

(*b*) Davis' Criminal Statutes, p. 70.

carry anything in this barge but the cargo he was directed to convey. He was actually forbidden to load this barge on the return voyage; he did load and very improperly earned money by the use of it; but in what sense he can be said to have received this sum for the use of his master I cannot understand. The test of the matter would really be this—if the person to whom the manure belonged had not paid for the carriage, could the master have said, "There was a contract with you, which you have broken, and I sue you on it"? There would have been no such contract, for the servant never assumed to act for his master, and on that ground his act does not come within the statute. I think that in no case could he have been properly convicted under the Act unless the money became that of the master.

63.

R. v. GALE.

(1877) 2 Q. B. D. 141 (C. C. R.).

A. was the head manager of an insurance company. In the ordinary course of business he received from the managers of branch offices cheques for £600 payable to his order, which he should have indorsed and handed to the cashier of the company. Instead of so doing A. indorsed the cheques and cashed them through friends; he then paid to the cashier £600 in notes and gold, presumably the proceeds of the cheques, saying that he wished it to go against his salary, which was overdrawn; in exchange he received back from the cashier his I O U's for £600 which he had previously given in respect of the overdraft. *Held*, that A. was guilty of embezzling the proceeds of the cheques.

Cockburn, C.J.—I entertain no doubt that this conviction must stand. On the face of the case, there can be no doubt that the prisoner might have been convicted of embezzling the cheques. He has been indicted, however, for embezzling the proceeds of the cheques. And the difficulty suggested arises from the fact that, instead of cashing the cheques at the bank, the prisoner obtained money for them from friends of his own, who, having given him the money, paid the cheques to their own bankers. Now, the prisoner is liable

under the statute if he received the money on account of his masters. But **the question is not whether those persons paid on account of his masters, but whether he received on account of his masters.** And if he did so because it was his duty to pay over the proceeds at once, in whichever way he received them. It is the same case as if, being on his way to cash the cheques he had met a friend in the street who cashed them for him, to save him the trouble of going to the bank. The prisoner, then, having received the money on account of his masters, and having dealt with it as he did, with the intention of appropriating it to his own use, was rightly convicted of embezzlement.

Lord Coleridge, C.J.—I am of the same opinion, and for the same reasons. I will only add that the statute speaks not only of a receipt "for or in the name of" the master, which may contemplate knowledge on the person paying, but also of a receipt "on account" of the master, that is, where the servant is bound to account to the master.

69.

R. v. EVAN JONES.

(1837) 7 C. & P. 833.

The prisoner was the clerk to the prosecutor, a slate merchant, and received from customers money paid by them for the purchase of slates. He was charged with embezzling sums received from two customers. The prosecutor and the prisoner had had no adjustment of accounts for two years, and, on the prosecutor calling for the prisoner's books, he could not find these sums entered. The prosecutor had never specifically asked the prisoner to account for these sums. *Held,* that there was no embezzlement.

Bolland, B.—There is not a felonious conversion. I will take it that the prisoner put the money into his own pocket, and has made no entry: that is not sufficient. Had he denied a receipt of the money the case might have been different. If the mere fact of not entering a sum was enough to support an indictment for embezzlement, every clerk who, through carelessness, omitted an entry, would be liable to be convicted of felony. The prisoner must be acquitted.

70.

R. v. JACKSON.

(1844) 1 C. & K. 384.

The prisoner was the servant of Mrs. Dolby, and received money paid by her customers for the purchase of bread. He was charged with embezzling sums received from three customers. It was proved by Mrs. Dolby that the prisoner had never accounted to her for either of these sums, or for any part of them, and had never paid any part of them over to her. In her cross-examination, Mrs. Dolby stated that the prisoner had never denied the receipt of either of the sums and had never delivered any account in writing in which they were omitted; but, in re-examination, she said that it was the duty of the prisoner, *on the evening of every day* (*a*), to render an account to her of all the moneys that he had received on her account in the course of that day, and immediately pay over to her the amount.

J. Jeffreys Williams, for the prisoner.—I submit that this is no embezzlement. There is no denial of the receipt of either of these sums, and the omission by a clerk or servant to pay over moneys he has received is no embezzlement. This appears from the cases of *R.* v. *Hodgson* (*b*) and *R.* v. *Norman* (*c*).

Coleridge, J.—What Mrs. Dolby said in her re-examination puts an end to this objection. She says that it was the **duty of the prisoner every evening to account for and pay over** to her all moneys received by him for her in the course of

(*a*) Note that in this case the prisoner was bound to render an account at stated times, whereas in the preceding case of *R.* v. *Evan Jones* he was under no such obligation.

(*b*) 3 C. & P. 422. In this case, however, the prisoner had in his account debited himself with all the money he had received, but had not transmitted it from London to Liverpool as he ought to have done, and it was held by Vaughan, B., that "This is no embezzlement: it is only a default of payment. If the prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not a felony." See also *R.* v. *Creed* (next case).

(*c*) C. & M. 501. In this case, however, the prisoner, in rendering his account, admitted the appropriation of the money alleged to have been embezzled, claiming to have it as a matter of right, founded on an alleged trade custom. Held by Cresswell, J., that there is no embezzlement "if, instead of denying his appropriation, a defendant immediately owns it, *alleging a right or an excuse for retaining the sum detained*, no matter how frivolous the allegation."

the day. If he wilfully omitted to do that, I am clearly of opinion that that is quite equivalent to a denial of the receipt of the money.

71.

R. v. CREED.

(1843) 1 C. & K. 63.

The collector of a water company gave to the prisoner, who was the turncock, authority to receive from three persons the amounts due from them for water rents. The next day the collector asked the prisoner if he had received the amounts, when he said that he had and would pay them over the next day, instead of which he absconded. *Held*, no embezzlement.

ERSKINE, J.—If the prisoner rendered a true account of the money he had received, it is no embezzlement; if he had received these sums, and had rendered an account in which the sums were omitted, it would be evidence to show that he had embezzled the amount.

72.

R. v. LLOYD JONES.

(1838) 8 C. & P. 288.

The prisoner was charged with embezzlement. It was opened for the prosecution that the prisoner had been shopman to the prosecutrix and that it would be proved that there was a deficiency in the prisoner's accounts, but that there was no proof of the embezzlement of any particular sum.

ALDERSON, B.—It is not sufficient to prove at the trial a general deficiency in account. **Some specific sum must be proved to be embezzled,** in like manner as in larceny some particular article must be proved to have been stolen.

(*a*) 7 C. & P. 635.

73.

R. v. GRUBBS.

[1915] 2 K. B. 689.

By s. 1 of the Larceny Act, 1901 (re-enacted by s. 20 (1) (iv) of the Larceny Act, 1916), "Every person who, being entrusted . . . with any property in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof . . . fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof, shall be guilty of a misdemeanour."

Explanation of the meaning of the word "entrusted."

Judgment of the Court of Criminal Appeal delivered by:

Lord Reading, C.J.—The appellant was convicted under the Larceny Act, 1901, of having fraudulently converted to his own use or benefit property entrusted to him for certain specific purposes, and property received by him for or on account of another. He appeals to this Court to quash the conviction on two grounds—first, that as a matter of law there was no evidence to support the verdict; and secondly, that the learned Recorder had misdirected the jury. If there had been no company in existence, there is no doubt that, if there was evidence that the property had been entrusted to or received by the appellant, there would have been ample evidence to support the conviction. But it is strenuously contended that the property was in fact and in law entrusted to or received by the company, and not to or by the appellant. It is not in dispute that the moneys were fraudulently converted, but the appellant says they were fraudulently converted by the company, and not by him. The company, it is said, was duly formed and incorporated under the Companies Acts, and therefore was a legal entity—a person—see *Salomon* v. *Salomon & Co.* (*a*). It is contended that the owner of the property intended in each case to entrust it to the company, and not to the appellant, and that the property was in fact received by the company, and not by the appel-

(*a*) [1897] A. C. 22.

lant; that, as the property came into the possession of the company and the moneys were paid into the banking account of the company, and were entered in the books of the company, and were applied to the use and for the benefit of the company, the appellant could not be convicted of any offence under the statute. The question raised is of general importance, for, if the appellant's contention is right, it would follow that, by the interposition of a duly formed company as the person entrusted with the property or by whom it is received, no person could be convicted of offences under the Larceny Act, 1901, and indeed of any offence against the criminal law, notwithstanding the undoubted fraudulent conversion of the property, since the company cannot be indicted and sent to prison. S. 1 of the Larceny Act, 1901, was passed for the purpose of meeting technical difficulties which had arisen in proving offences under ss. 75 and 76 of the Larceny Act, 1861, and was substituted for those sections. The first point to be decided in this case is whether there was evidence that the appellant was "entrusted" with the property in question, or whether he received it for or on account of any other person. This Court has no doubt that, if the appellant was entrusted with the property, or if he received it, there was evidence that he fraudulently converted it to his own use or benefit. **In the opinion of this Court a person may be entrusted with property, or may receive it for or on account of another person, within the meaning of this section, notwithstanding that the property is not delivered to him directly by the owner, and that in fact the owner does not know of his existence and has no intention of entrusting the property to him. If the accused has obtained or assumed the control of the property of another person under circumstances whereby he *becomes* entrusted, or whereby his receipt *becomes* a receipt for or on account of another person, and fraudulently converts it or the proceeds, then he has committed an offence within the section. For the purpose of determining whether the offence has been committed, the words "being entrusted" should not be read as being limited to the moment of the sending or delivering**

of the property by the owner, but may cover any subsequent period during which a person becomes entrusted with the property. Equally, the words "having received" may cover the receipt at any time by a person who receives the property for or on account of another. There cannot, however, be a fraudulent conversion without an intent to defraud. A company has no mind, and cannot have an intention; if the person directing and controlling the affairs of the company, and by whose instructions the property has passed into the possession of the company and has been converted, intended to convert it fraudulently, he would be guilty of an offence, whether the property was fraudulently converted to the use and benefit of the company, or to his own use and benefit. If he did the acts with an intent to defraud, it would not be an answer to prove that he did them as the agent or servant of another person, whether a company or an individual. Moreover, if the company was used by his directions as the instrument so as to enable him in the name of the company to become possessed of the property, and by means of the company to convert if fraudulently to his own use and benefit, he would be guilty of an offence under this statute.

Having now stated the law applicable, we proceed to examine the evidence. Where there is a conflict of testimony it must be considered by the light of the verdict. The charges made against the appellant and of which he was convicted were in respect of: [His Lordship then stated the charges and the facts and evidence].

The Court is of opinion that there was ample evidence to support the conviction of the appellant in respect of all these charges. Whether the transactions are regarded as those of the company, directed and controlled by the appellant as the agent of the company, or whether they are regarded as the transactions of the appellant, using the company as the instrument to carry them out, there is abundant evidence that, although the property was sent to the company, the appellant obtained or assumed exclusive control over the property in question, and that it was fraudulently converted by his directions. There was therefore evidence to support the conviction, and the appellant's first point fails.

Upon the argument as to misdirection of the jury by the learned Recorder, it is true that there are passages in the summing-up which apparently fail to recognise the legal entity of the company as a separate person, and which, taken alone, might convey the idea that a one-man company was necessarily a sham or bogus company; but viewed as a whole and without too minute an examination of the language of the Recorder, we are of opinion that it sufficiently directs the attention of the jury to the material questions of fact—namely, whether the appellant was the person who, having complete control of the affairs of the company, had become entrusted with, or had received the property, although nominally it was delivered to the company or paid into the banking account of the company, and whether the appellant had fraudulently converted the property either to the company's or to his own use and benefit. In our opinion, the passages in the summing-up of which complaint is made have not caused any substantial miscarriage of justice. If these observations had not been made by the Recorder, and if the direction had been quite accurate in law, the result of the facts of this case would have been the same, and the appeal must, therefore, be dismissed.

Note.

By s. 32 of the Larceny Act it is provided that: "Every person who by any false pretence, with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person . . . shall be guilty of a misdemeanour."

This section replaces the earlier statutory provisions, referred to in the cases following.

74.

R. v. JONES.

[1898] 1 Q. B. 119 (C. C. R.)

J. ordered and consumed a meal in a restaurant having only one halfpenny in his possession. He made no verbal representations as to his ability to pay and no questions were asked him. *Held*, that J. could not be convicted of obtaining goods by false pretences, but that he could be convicted of obtaining credit by fraud under s. 13 (1) of the Debtors Act, 1869.

Lord Russell, C.J.—The facts were shortly these. The prosecutor kept an eating-house, and on June 20 the defendant went in and asked for some soup; he was told that there was none ready, and thereupon asked for some cold beef; he was told that there was none, but that he could have some cold lamb and salad; and this he accordingly ordered. He then ordered half a pint of sherry, and went upstairs to have his meal; while there he rang the bell, and ordered another half pint of sherry. Subsequently he again rang the bell and asked what there was to pay; and upon being told four shillings, said that he had no means of paying, that he had no money and had (as was the fact) only a half-penny upon him. Such was the state of the facts. All that the defendant did was to go into an eating-house, order food and refreshment, and eat, but not to pay for it; no question was put to him and no inquiry was made from him by the prosecutor as to his means, nor was any statement made by him whether he had means to pay. The question is whether this can be regarded as a state of things in which a jury would be justified in finding that the defendant obtained consumable articles by false pretences. We do not desire to say anything which can weaken the authority of the decisions which say that there can be a false pretence by conduct; for example the case of *R.* v. *Barnard* (*a*) where a cap and gown were used by a man who had no right to wear them, in order to convey the notion that he was a member of the university. Nor do we in any way dispute the

(*a*) 7 C. & P. 784.

authority of another class of cases; that is, where a man gives a cheque on a bank where he either has no account or has not sufficient means to meet the cheque and must have known that he had not sufficient means. **In the present case the defendant did nothing beyond what I have already stated: no inquiry was made of him, and no statement was made by him.** Under the circumstances, we do not think that the case could properly be left to the jury on the first count; **there was no evidence that the defendant had obtained these articles by false pretences.**

A further question arises; it is provided by s. 88 of the Larceny Act, 1861, that if, upon the trial of any person indicted for the misdemeanour of obtaining goods by false pretences, it is proved that he obtained them in such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanour. But in the present case the defendant did not commit larceny. In the circumstances of the case it is quite clear that **the prosecutor parted not merely with the possession, but also with the property in his goods,** and that he intended to do so, for the goods were intended for immediate consumption. **The finding of the jury that the defendant was guilty of obtaining goods by false pretences cannot therefore be supported on that ground,** and the conviction on the first count is bad.

The second count is framed upon a different statute, upon s. 13 of the Debtors Act, 1869, which provides that in certain cases a person shall be deemed guilty of a misdemeanour, the first case being if in incurring any debt or liability he has obtained credit under false pretences or by means of any other fraud. There are three elements which have to be considered in the construction of that section: first, there must be the incurring of a debt or liability; secondly, there must be an obtaining of credit; and thirdly, there must be fraud: the conjunction of these three ingredients makes the offence. No one can doubt that the defendant did incur a debt or liability; he ordered goods under circumstances which implied a promise to pay for them. Then did he obtain credit? We are of opinion that he did. The prosecutor might have said

that he would not furnish him with the goods until he paid the price, or he might have insisted on payment in actual exchange for each article as it was supplied, but he did neither; he furnished the goods under circumstances which passed the possession and property in them, **relying on the readiness and ability of the defendant to pay.** It does not seem to matter that the period of credit was a short period; he trusted the defendant, and parted with his goods without insisting on prepayment or upon interchangeable payment. We think, therefore, that credit was obtained. Thirdly, was there fraud? There was a debt and there was credit, and we think there was ample evidence to justify the jury in arriving at the conclusion that the defendant was guilty of fraud. He goes to an eating-house where the ordinary custom is to pay directly after the goods have been consumed; he knows that such goods are supplied, not on personal knowledge, but on the understanding that the ordinary custom will be observed. The jury found that he had no intention of paying; he intended to cheat and so the jury found. We think therefore that the conviction was right upon the second count, and that it must be affirmed.

75.

R. v. BARNARD.

(1837) 7 C. & P. 784.

The indictment charged that the prisoner falsely pretended that he was an undergraduate of the University of Oxford, and a commoner of Magdalen College, by means of which he obtained a pair of boot-straps from J. S. V.

It appeared that Mr. V. was a bootmaker, carrying on business in High Street, Oxford; and that the prisoner came there, wearing a commoner's cap and gown, and ordered boots, which were not supplied to him, and straps, which were sent to him. He stated he belonged to Magdalen College.

It was proved by one of the butlers of Magdalen College that the prisoner did not belong to that college, and that there are no commoners at Magdalen College.

Bolland, B.—If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in the

cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the university, and if so, would have been a sufficient false pretence to satisfy the statute. It clearly is so by analogy to the cases in which offering for payment the notes of a bank which has failed, knowing them to be so, has been held to be a false pretence, without any words being used.

76.

R. v. HAZELTON.

(1875) L. R. 2 C. C. R. 134.

H. ordered goods saying that he wished to pay ready money for them, and gave in part payment a cheque for £5 drawn on a bank where he had only a deposit of a few shillings. Other cheques drawn by him had been refused payment, and he would not have been allowed to overdraw. *Held*, that there was evidence of a false pretence that the cheques were good and valid orders for the payment of their amount.

KELLY, C.B.—There are two questions in this case; first whether the prisoner has expressly or impliedly made a representation upon the faith of which goods have been obtained, and, secondly, whether that representation was false.

Several representations are laid in the indictment, and are proposed to us in the case as arising from the conduct of the prisoner in the present case. It is suggested that a person acting as the prisoner did represent that he then has money, to the amount of the cheque which he tenders, in the bank upon which it is drawn. If this had been the only representation suggested there would have been great difficulty in upholding the conviction. The giving of a cheque does not necessarily imply any such representation. Not only may a banking account be kept under a guarantee upon the express terms that it may be overdrawn, but, without any such arrangement, a person of position may often overdraw an account in perfect good faith and with the tacit sanction of his bankers.

Then it is suggested that the conduct of the prisoner amounted to a representation that he had authority to draw upon the bank for the sum for which he drew. I think that representation does arise. I do not see how it can but be implied.

But **as to the third representation there can be no doubt, namely, that the cheque is a good and valid order for the payment of its amount.** The case which has been cited *R.* v. *Parker* (*a*) is express upon the point; and that the goods were obtained upon the faith of the representation admits of no question.

It **remains to consider whether the representation made was untrue.** If a man's account were overdrawn and he had reason to suppose that his cheque would still be honoured this might be consistent with his having authority to draw and with his cheque being a good and valid order. But in the present case it is quite clear that the prisoner knew that his account at the bank was virtually closed, and that he knew his cheque would not be paid. He had therefore no authority to draw, and his cheque was not a good and valid order, that is to say one which might be cashed.

BRETT, J.—It is material, first, to see exactly what the question asked of us is. **In order to constitute the offence charged in the indictment a man must make a pretence or representation as to existing facts; it must be false to his knowledge; money or goods must be obtained thereby, and with intent to defraud.** Now the case states that the Common Serjeant doubted, upon the decided cases, whether in point of law a man who gives a cheque in payment under the circumstances before mentioned does by the mere fact of giving the cheque, without saying more than that he wishes to pay ready money, make either of the false pretences alleged in the indictment. And the question asked of us is whether there was any evidence to go to the jury of the prisoner having made any of the false pretences mentioned in the indictment. The only question asked of us is whether there was evidence of any of the representations mentioned.

(*a*) 7 C. & P. 829.

The first representation suggested is that the prisoner, when he gave the cheque, had a balance in the bank sufficient to meet it. A representation must depend upon what a man says and does, and what his words and acts would convey to the mind of another. It cannot depend upon the state of his own mind. Now, it is a matter of common knowledge that people do draw cheques, though they have not at the time funds at their bankers. Therefore this representation cannot arise.

The second suggested representation is, that the prisoner had authority to draw for the amount. If giving a cheque in payment does not mean this, it means nothing. There is therefore evidence of this representation. As to the third representation charged, but for the authorities I should have doubted. But upon the authorities I think it does arise. I also think there is evidence of the fourth false representation charged.

77.

R. v. LEE.

(1863) 1 L. & C. 309.

The prisoner obtained money from A. by pretending "that he was going to pay his rent on the [following] Monday." *Held*, that he could not be convicted of obtaining money by false pretences.

This case was considered by Cockburn, C.J., Pollock, C.B., Williams, J., Crompton, J., and Bramwell, B.

Cockburn, C.J.—We are all agreed that the case proved against the prisoner will not warrant the conviction. There is **no false pretence of an existing fact.**

78.

R. v. JENNISON.

(1862) L. & C. 157.

J., who had a wife living, told the prosecutrix that he was unmarried, and, pretending that he intended to marry her, induced her to give him £8, representing that he would furnish a house for them to live in and would then marry her. Having obtained the money the prisoner went away and did not return. For the prisoner it was argued that the money had been obtained by the joint operation of the three representations by the prisoner—that he was unmarried, that he would furnish a house, and that he would marry the prosecutrix; and that as only the first pretence had reference to an existing fact, while the others related to things to be done *in future*, the indictment could not be maintained.

ERLE, C.J.—In this case we are all of opinion that the prisoner was properly convicted. He was indicted for obtaining money by false pretences, the false pretences being, that he was an unmarried man, that he would marry the prosecutrix, and that with the money she was to give him he would furnish a house for them to live in. Now it is clear that a **false promise cannot be the subject of an indictment for obtaining money by false pretences.** Here, however, we have the pretence that he **was** an unmarried man. This was **false in fact,** and was essential, for without it he would not have obtained the money. Then this false fact by which the money is obtained will sustain the indictment, although it is united with two false promises neither of which alone would have supported the conviction.

78A.

R. v. GILES.

(1865) L. & C. 502 (C. C. R.).

A., whose husband had run away, went to the prisoner, who represented herself as a "cunning woman." The prisoner said that she *would* bring back A.'s husband, and obtained a shilling from A. for that purpose. She then said that she *could* bring back A.'s husband. She was indicted for obtaining the money by the false

pretence that she *had power* to bring back A.'s husband, and convicted. *Held*, that the conviction must be affirmed.

ERLE, C.J.—I am of opinion that the conviction must be affirmed. The material part of the false pretence is that the prisoner had power, which must be understood to mean supernatural power, to bring back the prosecutrix's husband. That is a sufficient false pretence within the meaning of the statute to sustain the indictment. Then, as to the evidence to support it, it is well ascertained law that the pretence must be of a present or past fact; a promissory pretence will not suffice. The question in this case is, was there any evidence that the prisoner had made the false pretence that she had the power at the time when the money was obtained? I think there is. The prisoner said that she *would* bring the man back. She then got the money; and after that she said she *could* bring him back. Now, it has been contended that the first was merely a promissory pretence, and that, as the second pretence was not made until after the money was obtained, there was no obtaining by such a pretence as falls within the meaning of the statute. I am of opinion, however, that **all the evidence must be taken together, and that looking at the whole transaction, the prisoner at the time she took the money intended the prosecutrix to believe that she had power to bring the husband back.**

79.

R. v. BANCROFT.

(1906) 3 Cr. App. R. 16.

B. was convicted of obtaining money by false pretences. He had during March and April canvassed for and obtained payment for advertisements in a directory, which he represented was to be published in May. *Held*, that a promise to do something in the future may imply a representation as to an existing fact which, if false, may be a sufficient false pretence to maintain an indictment.

THE LORD CHIEF JUSTICE.—[The point has been raised] that a statement as to a future fact was not a representation of an existing state of things and therefore was not a false

pretence. I cannot do better than read the summary of the law on the subject as given at p. 600 of the last (23rd) edition of Archbold's "Criminal Pleading": **"A promise to do a thing** *in future* **may involve a false pretence that the promisor has the power to do that thing, for which false pretence the promisor would be indictable."** Now, in view of that principle, let us look at some of the incidents of the false pretences proved. One witness, when asked "What do you say was a false statement?" answered "That the book was going to be published early in May." . . . Other witnesses gave evidence to the same effect. In these circumstances it was for the jury to say whether it was a statement made of an existing state of facts that he intended to get it published in May, and that the thing **was** *in order for publication* in May, and the jury have answered that question against the appellant. . . . The appeal must be dismissed.

80.

R. v. ARDLEY.

(1871) L. R. 1 C. C. R. 301.

A. went into the shop of a jeweller and asked him to purchase a watch-chain. He said to the jeweller: "It is 15-carat fine gold and you will see it stamped on every link. It was made for me, and I paid nine guineas for it. The maker told me it was worth £5 to sell as old gold." The jeweller gave A. £5 for the chain, which, though marked 15-carat on every link, was in fact of 6-carat gold. The prisoner made false representations as to his reasons for selling the chain. On his arrest another similar chain was found on him. Held, that the statement that the chain was 15-carat gold was not a statement as to a matter of opinion but a misrepresentation of a specific fact, and therefore sufficient to support a conviction for obtaining by false pretences.

Bovill, C.J.—But the jury have . . . found that the prisoner, when he represented the chain to be 15-carat gold, knew this representation to be false, and the question whether the conviction can be supported upon that finding alone stands upon a somewhat different footing. The cases have drawn

nice distinctions between matters of fact and matters of opinion, statements of specific facts and mere exaggerated praise. It is difficult for us, sitting here as a Court, to determine conclusively what is fact and what is opinion, what is a specific statement and what exaggerated praise. These are questions for the jury to decide. And the prisoner has this additional security, that the jury have to consider not only whether the statements made are statements of fact, but also whether they are made with the intention to defraud.

The case which has been most pressed upon us is *R.* v. *Bryan* (*a*). The representation in that case was, that certain plated spoons were "equal to Elkington's A." *Primâ facie* that representation would seem to be a mere matter of opinion, and the Court held that it was not sufficient to support the conviction. But many judges expressed the opinion that there might well be cases in which misrepresentations, though as to quality, would be within the statute. Cockburn, C.J., says: "If the person had represented these articles as being of Elkington's manufacture, when in point of fact they were not and he knew it, that would be an entirely different thing." Pollock, C.B., says: "I think if a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, the statute would apply." It is plain that these learned judges considered that a **specific representation of quality, if known to be false, would be within the statute.** Coleridge, J., expressly concurs in the observations of Pollock, C.B. Erle, J., at the close of his judgment says: "No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction upon the ground that there is no affirmation of a **definite triable fact** in saying the goods were equal to Elkington's A., but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendor has in

(*a*) D. & B. 265.

substance the article contracted for, namely plated spoons." Crompton, J., also considered that the statute applies **"when the thing sold is of an entirely different description from what it is represented to be."** Willes, J., who dissented from the judgment of the Court, goes the whole length of saying that a representation as to quality, if known to be false, is enough to support a conviction. And Bramwell, B., leans to the same opinion.

Applying these observations to the present case, the statement here made is not in form an expression of opinion or mere praise. It is a distinct statement, accompanied by other circumstances, that the chain was 15-carat gold. That statement was untrue, was known to be untrue, and was made with intent to defraud. How does that differ from the case of a man who makes a chain of one material and fraudulently represents it to be of another? Therefore, whether we look at the whole of the evidence, or only at that which goes to the quality of the chain, the conviction is good. The case differs from *Reg.* v. *Bryan* because **here there was a statement as to a specific fact within the actual knowledge of the prisoner, namely the proportion of pure gold in the chain.**

81.

R. v. COOPER.

(1877) 2 Q. B. D. 510 (C. C. R.).

C. obtained potatoes from the prosecutor by the following letter:—

"Sir,—Please send me one truck of regents and one truck of rocks as samples, at your prices named in your letter; let them be of good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours, etc.

"P.S.—I may say that if you use me well I shall be a good customer."

Held, that the words of this letter were capable of conveying a pretence, that C. was in a large way of business, that he was in a position to do a good trade in potatoes and that he could pay for

large quantities of potatoes when delivered to him. *Held*, also, that it was a question for the jury whether C. intended the prosecutor to put that construction on the letter.

LUSH, J.—The question for our consideration is, was there evidence on which the jury could reasonably convict the prisoner of the offence charged? (i.e. of obtaining by false pretences). The pretences charged are that "he then was a dealer in potatoes, and as such dealer in potatoes then was in a large way of business" that he "then was in a position to do a good trade in potatoes" and that he "then was able to pay for large quantities of potatoes as and when the same might be delivered to him." The pretence, in order to justify a conviction, must be of existing facts. It may be made either by words, or by acts. **It is sufficient if it can be reasonably and naturally inferred from the words, or from the acts, in order to raise a question for the decision of the jury. It is not necessary that the words or that the acts should be capable, only, of the meaning charged by the indictment.** If the words in the letter written by the prisoner in the present case were intended to mean and are fairly capable of meaning, that which is charged, and if they were so understood, then there was as much a pretence as though the letter had contained a definition of their meaning. The words here are capable of supporting the pretences charged. Without further explanation this large quantity is asked for as a sample, and then the prisoner says he will remit, and talks of the trade to be done. The letter is fairly capable of representing and conveying to the mind of the reader that the defendant was a man dealing largely, and in a position to do a good trade, and remit at once on delivery. **The jury** have adopted this construction, and **have found that the prosecutor did so read the letter, and that the prisoner intended** it to be so read. I therefore think the conviction right.

82.

R. v. DALE.

(1836) 7 C. & P. 353.

The prosecutor took a filly to Brecon Fair to sell. He there met the prisoner, who pretended that he was a gentleman's servant, living in Brecon, and that he would like to purchase the filly for his master. The prisoner further falsely alleged that he had bought twenty other horses at Brecon Fair. The prosecutor sold the filly to the prisoner, who took it away promising to come in half-an-hour to the "Cross Keys" and pay for it. The prisoner was indicted for obtaining the filly by the false pretences that he was a gentleman's servant and lived at Brecon and had bought twenty horses at the fair. The prosecutor, however, in cross-examination stated that he did not part with the filly on account of these false pretences, but because he believed that the prisoner would call at the "Cross Keys" and pay him. *Held*, that if this was the case the prisoner could not be convicted.

Coleridge, J.—The question for you to consider is, whether the prosecutor parted with his filly by reason of his having believed any false pretence made use of by the prisoner. It is sufficient for the prosecutor to prove that any one of the pretences charged in the indictment was false, and that he parted with his filly by reason of such false pretence, the prisoner intending to defraud him thereby. However, in this case the prosecutor himself says that he parted with his filly because the prisoner promised to pay him, **and not on account of any of the false pretences charged.** If you think that that was so, you will acquit the prisoner. *Verdict*—Not guilty.

83.

R. v. MILLS.

(1857) D. & B. 205.

M. was charged with obtaining money by false pretences. He was employed by the prosecutor to cut chaff and demanded and obtained payment for more than he had cut. The prosecutor had seen the prisoner add chaff to a heap which he had cut and knew that the pretence was false, but nevertheless paid the money demanded. *Held*,

that the prisoner could not be convicted of obtaining by false pretences.

COCKBURN, C.J.—The test is, what is the **motive operating on the mind of the prosecutor,** which induced him to part with his money? Here the prosecutor knew that the pretence was false; he had the same knowledge of its falseness as the prisoner. **It was not the false pretence,** therefore, **which induced the prosecutor to part with his money;** and if it is said that it was parted with from a desire to entrap the prisoner, how can it be said to have been obtained by means of the false pretences?

Note, however, that in such a case the prisoner can be convicted of *attempting to obtain by false pretences.*

84.

R. v. BUTTON.

[1900] 2 Q. B. 597 (C. C. R.).

B. sent to the secretary of an athletic meeting two forms of entry in the name of Sims, stating (as required by the rules) the performances of Sims in the last four races run by him. In consequence of this B. obtained a big start in two handicaps and, being a better runner than Sims, won both races easily. After the race B. again represented to the handicapper that he was Sims. He did not, however, apply for either of the prizes. *Held*, that he was properly convicted of attempting to obtain property by false pretences.

MATHEW, J.—The questions to be decided in the present case were pure questions of fact, namely, whether the intention of the defendant, when he entered for the races, was to obtain the prizes, and whether he made the representations with that intention. It appears from the case that he pretended to be a man who had never won a foot-race, and he was handicapped on the faith of that statement, as is shown by the evidence given by the handicapper; but it also appears from the case that his statement was false, for he had won races. Then it was suggested that he competed in the name of Sims, as it is put in the case, "for a lark"; but that question was for the

jury, and they have negatived the suggestion. It was also contended that his coming in first in the races was owing to his own good running; but it was also owing, in part at least, to the false pretences, for by means of the false pretences he obtained a longer start than he would have had if his true name and performances had been known. It is also said that some other act had to be done in order to make the offence complete, and that he could not rightly be convicted because it was not shown that he had applied for the prizes and that the criminal intention was exhausted. The argument is exceedingly subtle, but unsound. In fact he was found out before he had the opportunity of applying for the prizes, as no doubt he otherwise would have done. The pretences which the prisoner made were not too remote, and the conviction was good.

85.

R. v. SANDERS.

[1919] 1 K. B. 550.

A. sold to the prosecutor two mares for £70, warranting them to be, respectively, seven and eight years old and in foal, and agreeing to take them back within fourteen days if they were not as warranted. The prosecutor, immediately he received the mares, found that they were about seventeen years and not in foal, and wrote to the prisoner demanding the return of his £70, but, receiving no reply, did not send back the mares. *Held*, that A. could be convicted of obtaining money by false pretences.

Judgment of the Court of Criminal Appeal, delivered by BRAY, J.—It is contended that because the mares were not returned the indictment will not lie. I will assume that the prosecutor could not have recovered the money in a civil action if he had not returned the mares, but in a criminal charge it is immaterial whether he has returned them or not. It is said that the property in the money had not passed to the appellant (*a*), but it is quite clear that **in order to sustain**

(*a*) *I.e.*, because, owing to the provision for return of the mares if not as warranted, the property in the money did not pass to the appellant until the expiration of fourteen days.

an indictment for obtaining *money* **by false pretences it is not necessary to prove that the property in the money has passed.** In *R.* v. *Burgon* (*b*) it was held that where an advance of money by way of loan was obtained by a false pretence, an indictment for obtaining the money by a false pretence would lie. The next point that was taken was that an indictment for false pretences will not lie where a horse has been sold with a warranty. That question was long ago decided adversely to the contention of the appellant. It is only necessary to refer to *R.* v. *Kenrick* (*c*) where it was held that **a false pretence, knowingly made, to obtain money is indictable, though the money be obtained by means of a contract which the prosecutor was induced by the falsehood to make.**

86.

R. v. MARTIN.

(1866) L. R. 1 C. C. R. 56.

A. and B. entered into a contract under which A. was to build a van for B. A. was induced to undertake the contract by the false representations of B., and accordingly built and delivered the van. *Held*, that B. could be convicted of obtaining the van by false pretences, although it was not in existence when the contract was made.

BOVILL, C.J.—The question asked of us is whether the verdict was right upon the evidence. This we understand to mean whether there was evidence to go to the jury; and so understanding it we are all of opinion that there was. The objection urged upon us has been answered by my Brothers Willes and Blackburn in the course of the case; and it is obvious that there are many cases within the mischief of the statute where the thing obtained is not in existence when the false pretence is made. Thus a man by false pretences may

(*b*) (1856) 1 D. & B. 11.

(*c*) (1843) 5 Q. B. 49.

induce a tailor to make and send him a coat or a friend to lend him money, which may consist of bank-notes not printed when the false pretence was made on which the loan was granted. So also a man might obtain coals which were not got, and therefore not a chattel in the eye of the law, at the time of making the pretence. It is absurd to say that the chattel obtained must be in existence when the pretence is made. The pretence must, indeed, precede the delivery of the thing obtained; but at what distance of time? What is the test? Surely this, that **there must be a direct connection between the pretence and delivery**—that **there must be a continuing pretence.** Whether there is such a connection or not is a question for the jury. In *Gardner's Case* (*a*) the prisoner obtained, at first, lodgings only, and after he had occupied the lodgings more than a week, he obtained board; and it was held that the false pretence was exhausted by the contract for lodging, the obtaining board not having apparently been in contemplation when the false pretence was made. It is true that in *Bryan's Case* (*b*) the contract was for board as well as lodging; but there the indictment was for having obtained sixpence as a loan some time after the contract for board and lodging had been entered into; and it is clear that the obtaining the loan was as remote from the false pretence under which the contract for board and lodging had been entered into, as the obtaining of the board was from the false pretence in *Gardner's Case*. In the present case, when the false pretence was made and the order given, it was never contemplated that the matter should rest there; and we have no difficulty in holding that there was a continuing pretence, and a delivery obtained thereby.

WILLES, J.—I will only add that, since the cases of *R.* v. *Abbot* (*c*) and *R.* v. *Burgon* (*d*) it is impossible to contend seriously that the case is not within the statute because the chattel is obtained under a contract induced by the false pretence.

(*a*) D. & B. 40.
(*b*) 2 F. & F. 567.
(*c*) 1 Den. 273.
(*d*) D. & B. 11.

87.

R. v. FISHER.

[1910] 1 K. B. 149.

A. was convicted for obtaining a pony and cart by false pretences. He had represented that he wanted to buy them for his wife, who was delicate, and that he would give £2 for the hire of them for a week if he did not buy them. He had as security given a bill for £25, which was dishonoured, and he had also made false pretences as to his banking account. At the trial evidence was given that he had on another occasion obtained provender by the pretence that he was carrying on a milk business, and on a third occasion by the pretence that he was in the fish trade. *Held*, that the evidence was wrongly admitted and that, as it might have influenced the jury, it must be set aside.

Judgment of the Court of Criminal Appeal delivered by:

CHANNELL, J.—**The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence.** For example, on a charge of embezzlement, if the defence is that the failure to account for money is due to a mistake on the part of the prisoner, evidence is admissible to prove other instances of the same kind, because that evidence tends to prove that in the particular case the prisoner had not made a mistake. Another instance is where a person obtains goods by paying for them with a cheque which is subsequently dishonoured, in which case evidence is admissible to prove other cases in which the prisoner has obtained goods by cheques which were dishonoured. In other words, whenever it can be shown that the case involves a question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give

evidence of other instances of the same kind of transaction notwithstanding that the evidence goes to prove the commission of other offences, in order to negative the suggestion of mistake, or in order to show the existence of a systematic course of fraud. Applying these principles to this case, the charge here is that the prisoner obtained the pony and cart from the prosecutor by making certain statements. The falsity of those statements is not proved by giving evidence that in other cases the prisoner made other false statements though it does tend to show that the prisoner was a swindler. But there is no rule of law that swindling is, as regards proof, different from any other offence, and if a man is charged with swindling in a particular manner, his guilt cannot be proved by showing that he has also swindled in some other manner. We are of opinion that the evidence as to the other cases was inadmissible in this case because it was not relevant to prove that he had committed the particular fraud for which he was being charged, in that it only amounted to a suggestion that he was of a generally fraudulent disposition. On the other hand, **if all the cases had been frauds of a similar character, showing a systematic course of swindling by the same method, then the evidence would have been admissible.**

88.

R. v. RHODES.

[1899] 1 Q. B. 77 (C. C. R.).

R. was indicted for obtaining eggs by false pretences from W. Bays, the pretences being that he was carrying on business as a dairyman, that he required eggs for use in his business, and that he was in a position to pay for them. These pretences were contained in a newspaper advertisement purporting to be addressed from "Norfolk Farm Dairy, High Street, Mitcham, Surrey." Two witnesses, Elston and Chambers, proved that eggs had been obtained from them by a similar advertisement subsequently to the offence charged. Held, that this evidence was properly admitted.

Lord Russell of Killowen, C.J.—The second point for our consideration is whether the evidence of Elston and Chambers

was admissible for the prosecution. The case is not as carefully or precisely stated as we could have wished; but it appears that there was a charge of obtaining eggs from one Bays by the false pretence that the prisoner was honestly carrying on such a business, and required eggs for the purposes of such a business; and the prisoner appears to have advertised for a considerable time in various newspapers his wants for eggs. The prosecution alleged that the business was in truth and in fact a "bogus" business, and that the prisoner was not in a position to pay for the eggs. The charge before the Court was of obtaining eggs by false pretences from Bays, as I have said, and it was necessary, therefore, to prove these false pretences as made to Bays; but Elston and Chambers were also called for the prosecution to prove that they had acted on the same advertisement, and had supplied eggs to the prisoner in separate transactions of a similar nature to that between the prisoner and Bays, and had been defrauded.

Here again we have to complain of the want of precision in the case. We are not told in the case when these transactions took place; but we are informed by counsel that both transactions were subsequent to the dealing with Bays in respect of which the prisoner was charged, and that one of the transactions took place as much as two months after that time.

It seems to me quite clear that, if the transactions with Elston and Chambers had taken place before that with Bays and at a period not too remote, the evidence of Elston and Chambers would have been admissible against the prisoner. Is that evidence admissible although the transactions were subsequent to the offence charged?

That depends, as it seems to me, on the question whether or not the case put forward for the prosecution was that the prisoner was not carrying on a real business, but that **the business** in which he was engaged **was from first to last a bogus or sham business.** If the prosecution merely alleged *isolated transactions* of a fraudulent character against the prisoner *with no connection between them*, I should certainly say that evidence of transactions which took place after the offence charged was not admissible, more especially if such

transactions took place two months after the offence. But here, as I have said, the charge to be made out was that of carrying on a bogus **business**; and on the whole I think that the evidence was admissible on the ground that it showed **part of a scheme to defraud persons by the pretence of carrying on an honest and** *bonâ fide* **business.** The means by which the fraud was perpetrated was by advertisements in newspapers, which the prosecutor Bays and the witnesses Elston and Chambers alike saw and alike acted upon. The transactions in all three cases were therefore connected by the advertisement which formed part of the scheme.

89.

R. v. FRANCIS.

(1874) L. R. 2 C. C. R. 128.

A. was indicted for attempting to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring. *Held*, that evidence was properly admitted that, two days before the transaction on which he was indicted, he had offered other false articles to other pawnbrokers.

Lord Coleridge, C.J.—In this case the question reserved for the Court is, whether the evidence mentioned in the case was properly received for the purpose of proving guilty knowledge. No question is reserved as to the weight of that evidence, the judge who tried the case not entertaining any doubt that if the evidence was properly received the verdict was justified.

It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar

acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often, than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last, and this is amply borne out by authority. In the case of *R.* v. *Tattersall*, mentioned by Lord Ellenborough in *R.* v. *Whiley* (*a*), the question reserved by Chambre, J., was whether the prisoner had not furnished pregnant evidence, and whether the jury, from his conduct on one occasion, might not infer his knowledge on another. The opinion of the judges was that the jury were at liberty to make such an inference. The cases in which this has been acted on are mostly common cases of uttering forged documents or base coins, but they are not confined to those cases.

Now, in the present case, the prisoner was tried on two charges of attempting on the 8th January, at Northampton, to obtain money from two different pawnbrokers by the false pretence that a worthless piece of jewellery consisted of real stones. Evidence that he, on the 6th January, at Bedford, obtained money from another pawnbroker on the pledge of a chain which he represented to be gold, when it in fact was not gold, was surely matter from which the jury might infer that he was in a course of cheating pawnbrokers by knowingly passing off on them false articles under the pretence that they were genuine, and that inference was greatly strengthened by the fact that he at that time gave a false name, and though the charge on which he was tried was for attempting to pass off a false ring, the inference that he had guilty knowledge is as legitimate as if it had been a second false chain (*b*).

(*a*) 2 Leach 983.
(*b*) See also *R.* v. *Bond*; *R.* v. *Armstrong*; *post*, pp. 348, 363.

90.

R. v. KILHAM.

(1870) L. R. 1 C. C. R. 261.

K., by means of false pretences, induced the prosecutor to let him a horse for a day. The hire of the horse was never paid by K. *Held*, that he could not be convicted of obtaining goods by false pretences.

Bovill, C.J.—We are of opinion that the conviction in this case cannot be supported. The statute 24 & 25 Vict. c. 96, s. 88, enacts that, "whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of misdemeanour." **The word "obtain"** in this section **does not mean obtain the loan of, but obtain the property in, any chattel, etc.** This is, to some extent, indicated by the proviso, that if it be proved that the person indicted obtained the property in such manner as to amount in law to larceny he shall not, by reason thereof, be entitled to be acquitted; but, it is made more clear by referring to the earlier statute from which the language of s. 88 is adopted. 7 & 8 Geo. 4, c. 29, s. 53, recites that "a failure of justice frequently arises from the subtle distinction between 'larceny and fraud'" and, for remedy thereof, enacts that "if any person shall, by any false pretence, obtain," etc. The subtle distinction which the statute was intended to remedy was this: that if a person by fraud induced another to part with the possession only of goods and converted them to his own use, this was larceny; while, if he induced another by fraud to part with the property in the goods as well as the possession this was not larceny (*a*).

But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property and this intention did not exist in the case before us. In support of the conviction the case of *R.* v. *Boulton* (*b*) was referred to.

(*a*) See *R.* v. *Prince*; *R.* v. *Tideswell*; *R.* v. *Russett*; *R.* v. *Fisher*; *ante*, pp. 93, 94, 115, 116.

(*b*) 1 Den. C. C. 508; 19 L. J M. C. 67.

There the prisoner was indicted for obtaining, by false pretences, a railway ticket with intent to defraud the company. It was held that the prisoner was rightly convicted, though the ticket had to be given up at the end of the journey. The reasons for this decision do not very clearly appear, but it may be distinguished from the present case in this respect: that the prisoner, by using the ticket for the purpose of travelling on the railway, entirely converted it to his own use for the only purpose for which it was capable of being applied. In this case the prisoner never intended to deprive the prosecutor of the horse or the property in it, or to appropriate it to himself, but only intended to obtain the use of the horse for a limited time.

91.

R. v. CARPENTER.

[1911] 22 Cox. 922.

Obtaining money by false pretences—Obtaining credit by false pretences—Obtaining credit by fraud other than false pretences.

A., by falsely representing that he was carrying on a genuine and solvent banking business, induced a number of persons to deposit money with him. He paid interest to these depositors out of fresh deposits, his expenses exceeding his receipts. The attention of the Public Prosecutor was called to his business, and he was notified that it must cease and that the depositors must be informed of its insolvency. At the trial he gave evidence that, if he had been allowed to carry on business for a few more years he would have been able to realise his assets for a sum which would have paid all his creditors. *Held*, that the mere fact that A. intended to repay the money and may have honestly believed that he could repay it did not prevent him from having an intent to defraud.

Channell, J. (in the course of his summing-up to the jury).—The indictment contains no less than fifty-one counts. Those are all really fifty-one different charges; they relate to seventeen different sums of money that were deposited by eleven people, several of them, of course, depositing more than one sum, and those seventeen sums of money each of them forming the subject of three charges in this way—

obtaining money by false pretences; obtaining credit by false pretences; and obtaining credit by fraud other than false pretences. I must explain to you the difference between these three offences. In each of them it is necessary that there should be this intent to defraud, which has been much spoken of, and which I will deal with presently and explain to you. That is an element of all the three. For instance, you know he got the money on loan: now that being so, of course he got credit, but it does not prevent the charge being established of obtaining money by false pretences. **It is no defence to the charge of obtaining money by false pretences to say that the money was obtained on loan, that it was borrowed, and was to be repaid;** but what is necessary to establish the offence of obtaining either money or credit by false pretences is that there must be a misstatement of an existing fact, either by stating that a fact exists which does not exist, or to state that a fact does not exist which does exist. It must be a statement of existing fact as distinguished from mere promise or statements about the future, or expectations, and things of that sort. That is the main point which distinguishes the obtaining of money or credit by false pretences from obtaining credit by fraud other than false pretences. What you have got to consider, therefore, in the present case is whether this money was obtained by false pretences of existing fact, false to the knowledge of the person making them, and made with intent to defraud. If that is so, then the counts for obtaining money by false pretences will be established, and the counts for obtaining credit by false pretences will be established, because here the defendant obtained both money and credit. Then the third class of offence, you see, was obtaining credit by fraud other than false pretences. Mr. Bodkin, at the commencement of his speech to you just now, put some things that he would rely upon as general fraud in this case, which possibly would not be fraud of the character of false pretences, viz., misstatement of an existing fact. He pointed out to you that a man has to do certain things when he is carrying on this class of business, that he ought to explain matters. The mere omission to explain might possibly

be fraud—though that is, perhaps, somewhat doubtful—but the mere omission to explain, if that is all, would not be a false pretence of an existing fact; but of course that omission in most cases is not a bare omission, and a statement which omits the material matters and states something else is a misstatement of fact, of course. So that I rather think, when one comes to examine this case, that there is not very much that turns upon the second and third classes of offence that are charged. The main matter here is obtaining the money by false pretences, which must be, as I have said, misstatements of existing facts. I pass now to the next matter of law which I have to explain, and that is this intent to defraud, which has been, of course, the main ground of the defence to these proceedings, and which is a matter which no doubt may sometimes be misunderstood. The first remark to make about it is that it is not confined to—it may be included in, but it is not confined to—an intention to defraud any person of the money which is the subject of the charge. Take these cases of men who deposit £500 here upon what the defendant says: what is their understanding of the advertisements which we will come to deal with presently? It is necessary, of course—and that I will come to again directly—for you to be satisfied that it is the falsity of the matter contained in these advertisements that induces them to part with their money; that is a necessary element of the offence, but the question I was putting to you was that it was not necessary in order to make out intent to defraud that the defendant should have intended to appropriate to himself for his own use that deposit of £500. If he did so intend, of course that would be an obvious intent to defraud, but there may be an intent to defraud altogether apart from that. . . . **If the defendant made statements of fact which he knew to be untrue, and made them for the purpose of inducing persons to deposit with him money which he knew they would not deposit but for their belief in the truth of his statements, and if he was intending to use the money so obtained for purposes different from those for which he knew the depositors understood from his statements that he intended to use it, then, gentlemen, we have the**

intent to defraud, although he may have intended to repay the money if he could, and although he may have honestly believed, and may even have had good reason to believe, that he would be able to repay it. You see it is the fraud in the mode of getting the money, because you may by fraud get hold of money, even if you mean to repay it, and thoroughly believe that you can repay it—you are still defrauding the depositor. You are not defrauding him of the money if you eventually do repay it, but you are defrauding the man because you are giving him something altogether different from what he thinks he is getting, and you are getting his money by your false statement. In such a case as that the false statement would not be honestly made, and this question as to the intent to defraud substantially comes to this: whether or not the statements were honestly made. It is, as Mr. Bodkin just put it to you, very like the case of the man who embezzles his master's money to put it upon a horse, or of the man who appropriates his client's money to speculate with it upon the Stock Exchange: it is similar to that, and his belief that he will make it all right does not excuse the fraud by means of which he gets hold of the money. That, therefore, is substantially the charge that is made against the defendant.

92.

R. v. MARTIN AND TAYLOR.

(1806) R. & R. 108.

Burglary—Dwelling-house.

The prisoners were tried on an indictment for a burglary committed in the dwelling-house of one Samuel Clayson.

The house was to all intents and purposes a complete dwelling-house, if it could under the circumstances be considered as *inhabited*, upon which question the point arose.

The house stood in a street in Wellingborough, in the range of houses, the entry from the street being by a common

door-way. The inside of the house consisted of a shop and parlour, from whence the goods were taken, and a stair-case leading to a room over the shop in which there was bedding, but it was not fitted up. The prosecutor took it about two years before the offence was committed, and made several alterations in it, intending to have married and lived in it: but continuing unmarried, and his mother living in a house next door but one, he slept every night at her house. Every morning he went to his house, transacted his business in the shop and parlour, and dined and entertained his friends and passed the whole day there, considering it as his only home. **When he first bought the house he had a tenant, who quitted it soon afterwards, and since that time no person had slept in it.**

The question reserved for the opinion of the Judges was, whether this sort of inhabiting was sufficient to make the house the prosecutor's dwelling-house.

In Easter term April 28, 1806, at a meeting of all the Judges (except Lord Ellenborough) the conviction was held wrong, the house not being a dwelling-house.

93.

R. v. FLANNAGAN.

(1810) R. & R. 187.

Burglary—Dwelling-house.

The prisoner was tried on an indictment charging him with stealing goods to more than the amount of forty shillings, the property of Edward Treslove Cox, in his dwelling-house.

The jury found the prisoner guilty.

It appeared in evidence, that the prosecutor was an upholsterer, and formerly lived with his family in a house in St. Martin's Lane; but having, about three months before this trial, taken a house in the Haymarket, he and his family went to reside there, *keeping the house in Saint Martin's Lane as a*

warehouse and workshop, without any intent of returning to live in it.

For three or four days, or a week after his going to the Haymarket, no servant or other person slept in the house in St. Martin's Lane; but, in consequence of his thinking it not prudent to leave that house without some person to take care of it, two women employed by him as workwomen in his business, and *not as domestic servants*, slept there, to take care of the house, but did not have their meals there, or use the house for any other purpose than sleeping in it as a security to the house.

Subsequent to the prosecutor's going to reside in the Haymarket, and after the women slept there for the purpose beforementioned, the goods, subject of the indictment, were stolen by the prisoner from the house in St. Martin's Lane.

It was objected for the prisoner, that the house in St. Martin's Lane, was not at the time the goods were stolen the dwelling-house of the prosecutor, and that therefore the prisoner was guilty of a simple larceny only.

The question reserved for the opinion of the Judges was, whether this house in St. Martin's Lane could be considered as the dwelling-house of the prosecutor.

In Michaelmas term, November 10, 1810, all the Judges met, and held the conviction wrong, that this house could not be considered to be the dwelling-house of the prosecutor.

94.

R. v. TURNER.

(1784) 1 Leach, 305.

Burglary—Dwelling-house.

At the Old Bailey February Session, 1784, Thomas Turner was tried before Mr. Justice Buller—present, Mr. Justice Gould and Mr. Baron Perryn—for burglary in the dwelling-house of Edward Whitmead.

The prosecutor was coachman to Lady Hervey, and rented two lodging-rooms, at £6 10s. a year, which were situated over the coach-house and stables; but he had never paid any rent, nor were they rated in the parish books as dwelling-houses, but as appurtenances to the coach-house and stables.

The way to the coach-house and stables was down a passage out of Mill Hill Mews, and the Mews was an open thoroughfare both day and night. The entrance to the staircase which led to these rooms was through a door, which was never fastened, out of the passage leading to the coach-house and stables. There was a single door at the top of the staircase to each of the prosecutor's rooms, which were locked at night; and there were other rooms over the coach-house and stables situated in the same manner as those which the prosecutor rented. It was one of these rooms which was broke and entered by the prisoner.

The prisoner's counsel contended that this was a new case, and that these rooms, which probably were originally intended as mere hay-lofts, did not, in contemplation of law, form such mansions or dwelling-houses as to become the subject of burglary.

Mr. Justice Gould and Mr. Baron Perryn conceived, that the circumstance of their being situated over the coach-house and stables, would not alter the nature of the case. **They were to all intents and purposes the habitation and domicile of the prosecutor and his family; for they are perfectly distinct and unconnected with those rooms which were inhabited by other tenants; and although the two rooms which were broke open happened to communicate with each other only by means of the landing-place, or platform, yet they may well be considered as the mansion-house of the occupier. The door at the bottom of the staircase, though unfastened, is an outer door common to all the inmates under the same roof; and the respective doors to the rooms of each inmate are the safeguards or inner doors of their several inhabitants.** Mr. Justice Buller did not give any opinion, but he said he would save the case for the consideration of the Twelve Judges.

The jury found the prisoner not guilty of breaking and entering in the night time; but if the Judges should be of opinion that the place where the prosecutor inhabited was a dwelling-house, then guilty of stealing to the value of forty shillings out of the dwelling-house; and if the Judges should be of opinion that it was not a dwelling-house then guilty of stealing, but not in the dwelling-house.

In the July Session following the prisoner was put to the Bar, and informed by Mr. Reynolds, Clerk of the Arraigns, that his case had been considered by the Judges; and that they were of opinion that he was guilty of the felony charged against him in the indictment; and had judgment for stealing to the value of forty shillings out of the dwelling-house.

95.

R. v. GIBBONS AND KEW.

(1821) R. & R. 442.

Burglary—Dwelling-house.

The prisoners were tried and convicted.

It appeared by the evidence that the place broken into was a shop, which had been part of the dwelling-house in which the prosecutor John Bendall and his family had resided, until about two years and a half previous to the commission of the offence in question; at which time the prosecutor removed into another house, about two hundred yards distance from this shop; in this latter dwelling-house the prosecutor and his family were living at the time the offence was committed. From the time the prosecutor so ceased to reside in the house of which the shop was part, and until he put the servants of his trade therein, as hereinafter mentioned, the rest of the house (excepting the shop and a small room adjoining, called the counter, communicating inwardly with the shop), was occupied either with lodgers to whom the same had been let, and who resided and slept there, or partly by lodgers, and partly by the prosecutor.

It further appeared that about two years before the commission of the offence in question, in consequence of alarm arising from several robberies then lately committed in the neighbourhood and for fear the place should be robbed, the prosecutor put his foreman, the foreman's wife, and an apprentice, into two rooms of this house. The foreman's wife was the prosecutor's servant, employed in keeping the apartments clean. The prosecutor paid them (the apprentice as well as the others) weekly wages, in amount the same as they received previous to their going to these apartments. Before they went there they lived and slept in other apartments procured by themselves; but when the prosecutor removed them, he made no deduction on that account from their wages, nor were they to pay him any rent. The prosecutor stated that he placed them in these apartments solely for the purpose of taking care of the goods which he deposited there. . . It appeared that the foreman, his wife and the apprentice found their own provision, and dieted and lived there entirely; the prosecutor put them to sleep there only for the purpose of taking care of the goods.

The question for the opinion of the Judges was whether the shop in question was to be considered as being in law part of the dwelling-house of the said John Bendall.

In Easter term, 1821, the Judges met and considered this case, and were of opinion that the conviction was right (*a*).

96.

R. v. TRAPSHAW.

(1786) 1 Leach, 427.

Burglary—Dwelling-house.

William Trapshaw was convicted of breaking and entering the dwelling-house of James Linney in the day-time, Frances his wife, being therein, and stealing several articles of wearing apparel, value 7s. 4d., the property of the said James Linney;

(*a*) See *R.* v. *Flannagan*, *ante*, p. 177.

but the judgment was respited, and the question submitted to the consideration of the Twelve Judges whether, under the following circumstances, the room broke open by the prisoner was well laid in the indictment to be the dwelling-house of James Linney?

The house was situated in the Temple Mews, and belonged to the Earl of Radnor, who let the whole of it out in lodgings. It was inhabited by three families, and had only one outer door, which was common to all the inmates. James Linney rented the parlour on the ground floor and a single room up one pair of stairs, where he slept. It was the parlour on the ground floor that was broke open, and the things mentioned in the indictment were taken from that room by the prisoner.

The Judges assembled at Lord Loughborough's Chambers on the first day of Hilary Term to consider this case; and at the Old Bailey in the February Session following Mr. Justice Gould publicly delivered their opinion.

Mr. Justice Gould.—The indictment upon which this question arises is founded on the statute 3 & 4 Will. and Mary, c. 9, s. 1, which enacts: "That all and every person or persons that shall at any time . . . rob any dwelling-house in the day-time, any person being therein . . . shall not have the benefit of his or their clergy." The word "rob," in legal construction, always includes the idea of force and violence; and although this part of the statute does not expressly signify that breaking and entering the house is necessary to constitute the crime, yet it has always been held upon this statute, as well as upon other Acts of Parliament penned in the same manner, that those ingredients are *ex vi termini* included in, and implied by, the word "rob." It is, therefore, essential to consider what degree of breaking and entering is necessary, and it is settled in a variety of determinations upon the statutes relating to this subject, that the breaking must be of a dwelling-house, in the same way as would be necessary to constitute the crime of burglary upon the rules of the common law; the only difference between the two offences being that burglary must be committed in a dwelling-house in the night-time, and this offence must be committed in a dwelling-house

by day. The next consideration, therefore, is what shall be considered as a dwelling-house within the meaning of this Act of Parliament. In Michaelmas Term, 1773, a case on a conviction of burglary was determined by the Judges, the circumstances of which were analogous to the present case (*a*). The owner of the house had let the whole of it to different lodgers. The prosecutor rented a room on the first floor, a shop and a parlour on the ground floor and a cellar underneath the shop at £12 10s. a year. The owner took back the cellar to keep lumber in, for which he allowed the prosecutor a rebate out of his rent of 10s. a year. The entrance was into a passage by a door from the street, and on the side of the passage one door opened into the shop and another into the parlour, and beyond the parlour was the staircase which led to the upper apartments. The shop and parlour doors were broke open; and the Judges determined that these rooms were properly laid to be the dwelling-house of the prosecutor; for it could not be called the mansion of the owner, as he did not inhabit any part of it, but only rented the cellar for the purpose before-mentioned. And the number of houses, especially in the metropolis, which are in a similar situation, must have been left entirely unprotected against burglary, had it been determined that the apartments of lodgers were not their dwelling-houses, when the owner has, as it were, abandoned the dwelling himself and left the whole house to their enjoyment and possession. In February Session, 1781, the case of *The King* v. *Carrel* for burglary was reserved by Mr. Recorder. The house belonged to one Nash, who had let the whole of it in separate tenements. Jordan, the prosecutor, as tenant at will to Nash, rented a sleeping-room up one pair of stairs, and a workshop in the garret; the door of this workshop was broke open; and the question was, whether it could be considered as a mansion of John Jordan the prosecutor? and according to my note of this case the Judges were unanimously of opinion in the affirmative; and they relied upon *The King* v. *Rogers* as a case in point. . . . In the present case . . . all the Judges are of opinion that the two determinations

(*a*) *R.* v. *Rogers*, 1 Leach 89.

which I have recited are precisely in point; and that the present indictment properly charges the room broke open to be the dwelling-house of James Linney. The reason of this opinion becomes evident the moment it is stated. The owner of the house is, if I may so express myself, the lord of it; but having relinquished every part of it to the habitation of others, it cannot with any propriety be considered as his mansion or dwelling-house. **The entirety which resides with him is split into several possessions; and every separate apartment, being in a distinct and several occupation, is the distinct mansion-house of its respective possessor.**

97.

R. v. DAVIS AND ANOTHER.

(1817) R. & R. 322.

Burglary—Breaking.

The prisoners were tried upon an indictment which charged them with breaking and entering the dwelling-house of Thomas Porteous in the day-time, certain persons named being therein, and stealing therein a silver candlestick of the value of fifty shillings.

The house was situate in Half-Moon Street, Piccadilly, and the evidence of breaking the house (upon which alone this case was reserved) was the opening of the area gate at the street with a skeleton key and so descending the area steps and entering the house by a door in the area which did not appear to have been shut.

Abbott, J., having some doubt whether this was a breaking of the dwelling-house, told the jury he would reserve that point for the opinion of the Judges, if they should think the prisoners got into the house in the manner stated and stole the candlestick, and should think the candlestick of less value than forty shillings.

The jury said they thought the candlestick was not worth

forty shillings, and in other respects they thought the prisoners guilty.

ABBOTT, J., directed a minute to be made that the verdict might afterwards be recorded according to the opinion of the Judges upon the point reserved; and the learned Judge directed that, if the Judges should be of opinion that this was a breaking, the verdict should be recorded as finding the prisoners guilty of the breaking and entering, etc., and stealing to the value of thirty-nine shillings. But if the Judges should be of opinion that this was not a breaking, then the verdict was to be recorded finding the prisoners not guilty of the breaking but guilty of stealing to the value of thirty-nine shillings in order that they might have the benefit of clergy.

In Hilary Term, 1817, this case was considered by the Judges, when they were unanimously of opinion that **breaking the area gate was not a breaking of the dwelling-house, as there was no free passage in time of sleep from the area into the house.**

98.

R. v. JORDAN AND OTHERS.

(1836) 7 C. & P. 432.

Burglary—Breaking.

The first count of the indictment charged the prisoners Jordan and Sullivan, and another man named May, with breaking and entering the dwelling-house of our lord the King, in the parish of Saint Dunstan in the East, and stealing therein a quantity of bank-notes and sovereigns. In the second count the *locus* was described as the dwelling-house of Elizabeth King Kelly; and in the third as a counting-house of our lord the King. The charge against the prisoners Mott and Seale was, that they "before the said felony was committed, to wit, on November 27, 1834, feloniously and maliciously did incite, move, procure, counsel, hire, and

command," the said Jordan, Sullivan, and May, "the felony aforesaid, in manner and form aforesaid, to do and commit"; against the statute, etc.

The principal witness against the prisoners was an accomplice named Huey; and from his statement it appeared that the prisoners Jordan and Sullivan accompanied May, who was to secrete himself in the office of the receiver of fines and forfeitures, that during the night he might commit the robbery; and that, the door being latched, they assisted him in gaining admission by opening an umbrella to screen him from observation while he entered; but it appeared that they went away soon after he had got in, and were not seen near the place again until after the robbery had been committed.

C. Phillips objected that, assuming Huey's statement to be true, there was no evidence to affect Jordan and Sullivan as principals. All that appears is, that they put May into a situation to commit the felony, but did not assist him in the commission of it; and, for aught that appears, May may have committed the offence while Jordan and Sullivan were some miles off.

Clarkson, on the same side.—I do not say anything at present about the law as to the breaking and entering, because your Lordship would tell me that the jury might find the prisoners guilty of the larceny without the breaking and entering. It cannot be contended on the other side that these parties are principals in the first degree, for they were not present at the fact. I do not say that, unanswered, Huey's evidence does not prove abundantly the offence of being accessories before and after the fact. It is not shown that they were near enough to give assistance at the time. With respect to the breaking and entering, there is no case which shows that even entry by ingenuity and stratagem amounts to a breaking. If the opening of the door had been procured by fraud, it might be a breaking, but there is no fraud shown.

Gaselee, J.—I will tell you how it strikes me. If the entering . . . amounts in law to a breaking and entering, the question will be, whether it is not such an act as makes the persons concerned in it principals in all that was done afterwards, they going there to commit this larceny.

CAMPBELL, A.G., for the prosecution.—There was an inner door that May unlatched, which constitutes a breaking. I admit that mere concert will not do; and it is for that reason that we have indicted Mott and Seale as accessories.

GURNEY, B. (stopping the Attorney-General).—The way in which my Brother Gaselee put it satisfies me. **The parties are actually present at the commencement of the transaction, and it is not necessary that they should be present during the whole commission of the offence.**

ANDREWS, Serjt., submitted to the Court that the confirmation of Huey, the accomplice, was not sufficient to warrant a conviction.

GURNEY, B.—It is not a matter to be argued. I shall put it to the jury.

PAYNE, who was with Andrews, Serjt., asked if his Lordship would allow him to mention some recent decisions as to the kind of confirmation which was required.

GURNEY, B.—I am quite aware of all the cases. *You know very well that persons have been convicted on the evidence of an accomplice alone, but I hope it will never be so again.* As far as I can I will take care that it shall not. In this case we are quite of opinion that it is not necessary that the accomplice should be confirmed as to each particular prisoner.

CLARKSON.—Your Lordship takes into consideration the objection as to the breaking?

GURNEY, B.—**I do; and we think it is a matter to go to the jury. We have all three considered the objection, and are of opinion that, assuming the evidence to be true (which is the way to try the question of law), if Jordan and Sullivan were present at the commencement, they must be considered as guilty of the whole. There has been a case of burglary where the breaking was one night and the entry the next, and the Judges have decided that a party who was present at the breaking, and not present at the entering, was guilty of the whole. We consider this a much stronger case than that.**

GURNEY, B., in summing up, after stating the indictment, said.—It seems clear that the office of the receiver of fines

and forfeitures was entered not by the breaking of any outer doors, or so as to leave any vestige of the breaking of any inner doors, though it seems the chest was broken open. There are two reasons why accomplices are allowed to be called: one is, that without them great crimes might pass undiscovered; and another, the fact that the knowledge that an accomplice may betray him tends to prevent a person from engaging in the commission of a crime. *But the interests of innocence require that the evidence of an accomplice should not be acted upon without great caution;* and I should advise you not to trust to it unless it receives such confirmation as to satisfy you that it is true, and that you can trust it as a faithful account. It appears that a person lived on the premises as a servant of the public, and this indictment rightly describes the place where the robbery was committed as the dwelling-house of our lord the King, as he occupied it by a servant. With respect to the breaking, the witness Steele says that he latched the door, and that a person might get in while he was gone to lock some other place, as his back was then turned to the door, and he says he left no person in. The question for your consideration will be, whether the door was shut, and was opened by the person who committed the felony, whoever it was. **If Steele left no person in when he went out, and he latched the door, and the person who got in, got in by raising the latch, that is as much a breaking in law as if he had broken through twenty bars of iron. . . .** After some observations on Huey's criminality on the one hand, and his evidence of penitence on the other, his Lordship said: "You will not trust implicitly to his evidence without corroboration. The corroboration which is offered to you to induce you to believe the story he tells is of different parts: the one to show that all these parties had together the sort of intercourse, which he describes, of meeting at each other's houses, about the time when the robbery was committed; the other is the tracing to one of the parties one of the notes stolen. The question is this—Is the evidence of Huey so confirmed as to induce you to believe that he has told the truth with respect to the four prisoners at the bar?

99.

R. v. SMITH.

(1827) 1 Moody, 377.

Burglary—Breaking.

The prisoner was tried for breaking and entering a dwelling-house and committing larceny therein.

He was convicted of the full offence, on the authority of a similar case that had recently occurred at the Old Bailey.

From doubts, however, that were understood to have been afterwards expressed upon the point, the learned Judge respited the judgment, in order to take the opinion of the Judges upon the propriety of the conviction, as to the capital part of the offence.

The housebreaking (if there was one by the prisoner) was by pushing up or raising the lower sash of the parlour window, which was proved to have been at about eight or nine o'clock in the morning, in a close state and shut quite down, but to have been also seen about twelve o'clock at noon of the same day in an open state or raised about a couple of inches, with the prisoner very near it; but yet only so open and raised as that there was not room enough for a person to enter the house through that opening, and commit the larceny. On the evidence it was clear that the prisoner immediately afterwards threw the sash quite up, and then having thus removed the obstruction to his entrance, entered through the enlarged aperture thus made, and committed the felony; but the jury declared their opinion to be that the prisoner did not open the window all the way, but only raised the sash the second time.

The question for the opinion of the Judges was whether the prisoner was properly convicted of the house-breaking, or whether he should have been convicted of larceny only?

In Hilary Term, 1828, the Judges met, and all thought there was no decision under which this could be held to be a breaking, and that they ought not to go beyond what had been decided, unless the case was within some settled principle, which this was not; and that the conviction for housebreaking was, therefore, wrong.

100.

R. v. ROBINSON AND BACCON.

(1831) 1 Moody, 327.

Burglary—Breaking.

The prisoners were tried for breaking and entering the dwelling-house of Charles Pullen, in the parish of Petworth, Sussex, and stealing therein a silver watch.

A doubt having arisen in the learned Judge's mind whether according to the law laid down in *Rex.* v. *Smith* (*a*), there was a sufficient breaking, he thought it safest, after consulting Patteson, J., on the subject, to state the case for the opinion of the Judges.

The entry had been effected in the following manner: a square of glass in the kitchen window (through which the prisoners entered) had been previously broken by accident, and a half of it was out at the time when the prosecutor left his house and property safe on the day of the offence committed.

The aperture formed by the half square which was out was sufficient to admit a hand, but not sufficient to enable a person to put his arm in so as to undo the fastening of the casement. One of the prisoners thrust his arm through this aperture, thereby breaking out the residue of the square, and having so done, he removed the fastening of *the casement*; the window having been thus opened, the two prisoners entered the house and stole the watch.

In Hilary Term, 1832, all the Judges (except Lord Lyndhurst, C.B., Garrow, B., and Bolland, B.) met and considered this case, and were unanimously of opinion that this was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window; and they held that the conviction was good.

(*a*) *Ante*, p. 189.

101.

R. v. SAMUEL HALL.

(1818) R. & R. 355.

Burglary—Breaking.

The prisoner was tried and convicted of burglary; but upon a doubt as to the question of *breaking* into the house, the learned Judge saved the point for the consideration of the Judges.

The prisoner entered the house by lifting up a large iron grating, which was placed over the prosecutor's cellar, and opening a window in a passage leading from that cellar. The cellar opened into a passage which led into the house, and the window was within the wall of the house, the cellar was beyond the walls. The grating weighed eight stone, and was usually fastened inside by a large iron chain, but it was not so fastened at the time the prisoner entered. The grating was for the admission of light only, not of goods. The window opened upon hinges, and was fastened by two nails which acted as wedges; but notwithstanding these nails would open by pushing.

It was argued that the lifting up the grating was no breaking, because it was kept down by his own weight only, and that the forcing open the window was no breaking, because it was done by pushing only.

The learned Judge thought the forcing the window was a breaking, but he reserved the point for the consideration of the Judges.

In Easter Term, 1818, the Judges met. They held the conviction right, being of opinion that the forcing the window in the manner described was a sufficient breaking into the dwelling-house.

102.

R. v. HAINES AND HARRISON.

(1821) R. & R. 451.

Burglary—Breaking.

The prisoners were tried and convicted for burglariously breaking and entering the dwelling-house of Richard Plunkett, with intent to steal the goods and chattels in the same dwelling-house then being.

The evidence was satisfactory as to the fact; but a doubt arose whether the *breaking* was sufficient in point of law to constitute burglary.

The prisoners were found in the front parlour of the prosecutor's house about a quarter-past five o'clock in the evening of January 16, 1821. It was then quite dark. It appeared tht they had entered through the upper part of the window, which the prosecutor had closed a short time before, and which the prisoners had opened by pushing down the upper sash.

There was a fastening to the lower sash, but none to the upper sash, which, during the day-time, was usually kept closed by the pulley-weight only.

There was an outside shutter to this window, which was usually closed and fastened about dark by the sons of the prosecutor on their return from school, but on the evening in question the closing the outer shutter was delayed in consequence of the children returning later than usual from school.

The question was whether the pushing down of the upper sash by the prisoners in the manner stated amounted to a sufficient breaking.

In Easter Term, 1821, the Judges met and considered this case. They were unanimiously of opinion that the pulling down of the sash was a sufficient breaking, and the prisoner was rightly convicted.

103.

R. v. HYAMS AND OTHERS.

(1836) 7 C. & P. 441.

Burglary—Breaking.

The prisoners were indicted for burglary in the dwelling-house of Jane Hart.

It appeared from the evidence of the prosecutrix, that she went out, leaving her window shut down, but not fastened, though she admitted that there was a hasp which could have been fastened to keep it down. The entry was effected by raising the window.

For the prisoners it was objected that this was not sufficient evidence of a breaking, as the window was not fastened when it might have been, and that it was similar to that of pushing farther up a window left a little open, which had been held not to be a breaking.

Mr. Justice Park and Mr. Justice Coleridge were of opinion that there was enough to constitute a breaking; and the prisoners were convicted.

104.

R. v. RUSSELL.

(1833) 1 Moody, 377.

Burglary—Breaking.

The prisoner was tried and convicted for burglary, in breaking and entering the dwelling-house of James Grady with intent to steal the goods and chattels in the dwelling-house.

The prisoner got into the house between the hours of eleven o'clock at night and one in the morning. The jury found the intent to steal; but there was a question whether there was such a breaking as constituted that ingredient of burglary.

There was a cellar under the house, and which communicated with the other part of it by an inner staircase. The entrance to the cellar from the outside was by means of a flap which let down; the flap was made of two-inch stuff, but that was reduced in thickness by the wood being worked up. The prisoner got into the cellar by raising up the flap door. The flap door had been from time to time fastened with nails, when the cellar was not wanted, to keep coals in.

A good deal of evidence was given as to whether on the night in question the door was nailed down, and the learned Judge desired the jury to find whether it was so or not. They found that it was not nailed down that night.

In Easter Term, 1833, the Judges met and considered this case, and were of opinion that there was a sufficient breaking and that the conviction was right.

105.

R. v. LAWRENCE AND WEAVER.

(1830) 4 C. & P. 231.

Burglary—Breaking *out*.

There were two counts in the indictment: the first charging the prisoners with breaking into the dwelling-house of Henry Gatehouse, with intent to steal his goods; the second count charged a breaking *out* of the house.

There was no evidence to show how the prisoners got into the house, but the evidence of the breaking out was as follows:—Mr. Gatehouse, the prosecutor, said, "At about half past ten o'clock, on the night of the 6th of December, I secured my house and went to bed. There is a trap-door over the cellar in the court-yard, which was down. This trap-door drops down into its place, but has no fastening of any kind; it is merely kept down by its own weight. This trap-door is a new one; and on the 6th of December, the fastenings had not been put upon it. The old trap-door, for which this new one was substituted, had been secured by

fastenings. I did not lose any of my property." A watchman said, "I was on duty on the night of the 6th December; I saw the prisoner Lawrence push up the trap-door and come out of Mr. Gatehouse's cellar. I also heard the footsteps of a man in Mr. Gatehouse's hall. I heard a second man unlock the hall-door, and open it, and then run out of the house. That man was the other prisoner."

BOLLAND, B.—I am of opinion that the lifting up of this flap by the prisoner Lawrence is not a sufficient breaking [out]. I think, therefore, that he must be acquitted. As to the other prisoner, I am decidedly of opinion that **the unlocking and opening of the hall door and running away are sufficient to constitute a breaking out of the house.** The case is therefore made out as to him, if the jury are satisfied that he is the person who broke out of the house.

106.

R. v. HUGHES AND OTHERS.

(1785) 1 Leach, 407.

Burglary—Entry.

This was an indictment for burglary with intent to steal. The prisoner had bored a hole, with a centre-bit, through the panel of the house-door, near to one of the bolts by which it was fastened, and some pieces of the broken panel were found inside the threshold of the door; but it did not appear that any instrument, except the point of the centre-bit, or that any part of the prisoners' bodies had been withinside the house, or that the aperture made was in fact large enough to admit a man's hand.

The Court was clearly of opinion, that this was a sufficient breaking; but the doubt was, whether it could possibly be construed such an entry as the law required to constitute the crime of burglary? The point was argued by counsel to this effect:

For the Prisoner.—Whatever notions may have prevailed upon this subject in times of high antiquity it has been long established in theory, and confirmed by the uniform practice of ages, that there must be both a breaking and an entering to constitute the crime of burglary. They are distinct and separate acts: and "the words *fregit et intravit*," says Lord Hale, "are indispensably necessary to an indictment for this offence; for breaking without entering, or entering without breaking, makes not burglary" (*a*). But the question in the present case is, Whether these acts can be said to be complete, unless they are carried into such a degree of effect, as will afford to the burglar an opportunity of committing the premeditated felony? In burglary, there must be a breaking in fact; for a mere breaking in construction of law is not sufficient (*b*); and until the passing of the 12 Ann. c. 7, an actual entry into the house, subsequent to and by means of the breaking, was also required. There are, however, some cases upon this subject in which it must be acknowledged that from an anxiety to preserve domestic security sacred and inviolate during the hours of night, the ancient principles of the common law respecting burglary have been construed with a latitude not usual in questions of life or death; and it has been held, that the smallest degree of entry whatever is sufficient to satisfy the law. *Putting a hand, or a foot, or a pistol, over the threshold of the door, or a hook or other instrument through the broken pane of a window* (*c*), *have been decided to be burglarious entries*; but the principle of all these new determinations is, that there has been such a previous breaking of the castle of the proprietor, as to render his property insecure, by affording to the burglar an opportunity to commit the projected felony, of whatsoever kind or description that felony may be. By the introduction of such effective members of the body as the hand or the foot, it is

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(*a*) 1 Hale 550; 1 Hawk. P. C. 160. See also an illustration of this position by Sir E. Coke, 3 Inst. 80.

(*b*) 1 Hale 552; Dalt. 487; Kely. 67, 70.

(*c*) So determined in Hilary Term, 26 Eliz. 1; And. 115. See also Lambard, cap. 7, p. 263; 1 Hale 439, 555; Sum. 80; Kely. 111; Foster 350, 353; 1 Hawk. 161.

clear that there must be an opportunity afforded of taking out property, and therefore such entries are held sufficient. By the introduction of a pistol, terror is applied to the true man, and the property is taken by means of fear. And **in those cases where an instrument has formed any part of the question, it has always been taken to mean, not the instrument by which the breaking was made, but the instrument, as a hook, a fork, or other thing by which the property was capable of being removed, introduced subsequent to the act of breaking, and after that essential preliminary had been fully completed.** Suppose the brick wall of a house to be broken with a pickaxe, and that part of the pickaxe had in the violence of breaking been withinside of the house, could this have been held an entry to steal? In the present case, the introduction of the instrument is part of the act of breaking, but it is impossible to conceive that it was introduced for the purpose of purloining property, for it is incapable of performing such an office. It was used for the purpose of breaking into the domicile of the proprietor; and if the breaking it effected had enabled the prisoners by any possible means to have taken goods through the aperture, that branch of the offence would most certainly have been complete; but as no property has been proved to lie near the hole, so as to be removed by means of a hand, hook, or other instrument, the degree of breaking itself seems insufficient. The cases that have been mentioned of entries by a hand, or a foot, or a pistol, all proceed on the idea that the breaking had been previously completed, and are considered as acts of dominion, acquired by the breaking, over the property of the owner; but there is not a case which has yet gone the length of determining, that the introduction of an instrument in the act of breaking shall satisfy the two acts which the law requires, viz., a breaking to obtain dominion over the property, and an entry to steal it.

The prisoners were acquitted of the felony, but they were detained and convicted at Hicks's Hall of the misdemeanor.

107.

R. v. BAILEY AND ANOTHER.

(1818) R. & R. 341.

Burglary—Entry.

The prisoners were tried and convicted on an indictment for burglary.

It appeared in evidence that a sash window belonging to the dwelling-house was fastened in the usual way, by a latch, from the bottom of the upper sash to the top of the lower one; and that there were inside shutters, which were fastened. One of the prisoners broke a pane of glass in the upper sash of this window, and introduced his hand within, with the intention to undo the latch by which the window was fastened. While he was cutting a hole in the shutter with a centre-bit, and before he had undone the latch of the window, he was seized.

The point reserved for the consideration of the Judges was, whether the introduction of the hand, between the window and the shutter to undo the window latch, was a sufficient entry.

In Hilary Term, 1818, this case was taken into consideration by nine of the Judges, when they were of opinion that there was a sufficient entry to constitute a burglary, and that the conviction was right.

108.

R. v. JOHN DAVIS.

(1823) R. & R. 499.

Burglary—Entry.

The prisoner was tried for burglary in the dwelling-house of Montague Levyson.

The prosecutor Levyson, who dealt in watches and some jewellery, stated that on January 2, about six o'clock in the evening, as he was standing in Pall Mall opposite his shop,

he watched the prisoner, a little boy, standing by the window of the shop which was part of the prosecutor's dwelling-house, and presently observed the prisoner push his finger against a pane of the glass in the corner of the window. The glass fell inside by the force of his finger. The prosecutor added that, standing as he did in the street, he saw the forepart of the prisoner's finger on the shop side of the glass, and he instantly apprehended him.

The jury convicted the prisoner, but the learned Judge having some doubt whether this was an entry sufficient to make the offence a burglary submitted the case to the consideration of the Judges.

In Hilary Term, 1823, the case was taken into consideration by the Judges; who held that there was a sufficient entry to constitute burglary.

109.

R. v. RUST AND FORD.

(1828) 1 Moody, 183.

Burglary—Entry.

The prisoners were tried and convicted for burglariously breaking and entering the dwelling-house of John Roper with intent to steal.

Of the breaking there was no doubt, and the learned Judge left the intent to the jury, telling them if they thought the intent was to steal to find the prisoners guilty, and that he would take the opinion of the Judges upon the question of entering; the counsel for the prisoners having contended there was no sufficient proof of an entry. The jury having found the prisoners guilty the learned Judge respited the judgment.

The facts were these as to the entering, the glass sash-window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the shutters themselves were about an inch thick.

It appeared that, after the sash was thrown up, a crowbar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found on the inside of the shutters.

The inclination of the learned Judge's opinion at the trial, as well as that of Mr. Baron Garrow, was that this was no burglary, as it did not nor could it appear whether any part of the hand was within the window, although the aperture was large enough to admit the hand.

This seemed to the learned Judge to be the general result to be collected from the cases.

But as the case approached so near to that of the *King* v. *Bailey and Spencer* (*a*), and of the *King* v. *Davis* (*b*), the learned Judge thought it right, with the concurrence of Mr. Baron Garrow, to save the point for the opinion of the learned Judges.

In Easter Term, 1828, the learned Judges determined that this conviction was wrong, there being no proof that any part of the prisoner's hand was within the window.

110.

R. v. CHANDLER.

(1913) 82 L. J. K. B. 106.

The prisoner was charged with breaking and entering a pawnbroker's shop. He had induced the pawnbroker's assistant, who was acting with the knowledge of his master and of the police, to let him have the key of the shop, of which he had taken an impression enabling him to make a false key, and he had entered the shop by unlocking the door. The pawnbroker knew that the prisoner intended to enter the shop on a particular day, and had him watched by the police, who arrested him when he entered. *Held*, that there was a breaking of the shop.

Judgment of the Court of Criminal Appeal delivered by:

Avory, J.—There is really nothing in this case except the question whether the decision of Mr. Justice Maule in *Reg.* v.

(*a*) *Ante* p. 198. (*b*) *Ante* p. 198.

Johnson (*a*) is an authority applicable to it. But for that decision, it is quite clear that the appellant with a key broke and entered the premises in question, and did so with intent to steal. That is not disputed. The appellant has therefore done everything necessary to constitute the crime of shop-breaking. It is, however, said that because the servant of the proprietor of the shop had furnished the appellant with the means of getting into the premises, it must be assumed that what was done by the appellant was done with the assent of the proprietor. The proprietor never did assent to the appellant breaking into the premises for the purpose of stealing the goods. Assuming that the act of the servant was the act of the proprietor, the appellant was only allowed to have possession of the key in order that he might be detected in the commission of the offence. That did not make the assistant an accomplice. Nor did it authorise a felonious breaking into the premises. In *Reg.* v. *Johnson* the whole decision is to be found in these words of Mr. Justice Maule: "Under the circumstances of this case the prisoners went in at a door which, as it seems to me, was lawfully open." There the prisoner walked in at the open door; therefore there was no breaking. In the present case the appellant did not walk in by an open door, but broke open the door with a key, and he did it intending to steal. He was arrested while carrying out that scheme. It is sufficient to say that *Reg.* v. *Johnson* does not cover the present case, on the ground of the distinction which I have pointed out. If that case is not in the way, there is evidence of a man doing everything to constitute the crime of shopbreaking. Therefore the Court is of opinion that the conviction was right. The appeal will be dismissed.

(*a*) 1 C. & M. 218. In this case it was held that there was no breaking where by pre-arrangement a servant opened the door of a house to the prisoner who walked in and was arrested.

111.

R. v. RILEY.

[1896] 1 Q. B. 309.

By s. 38 of the Forgery Act, 1861 (*a*), it is a felony to demand or obtain money by any "forged instrument." R., a post-office clerk, sent to a bookmaker a telegram betting on a horse for a certain race. The telegram purported to have been handed in at a branch office at Manchester at 2.40 P.M. and to have been received at the head office for transmission to the prosecutor at 2.51. The race was run at 2.45. In reality the telegram was never handed in at any branch office, but was despatched by the prisoner from the head office after learning the result of the race. The bookmaker, believing that the telegram was handed in at 2.40, accepted the bet and, the horse having won, credited R. with his winnings. *Held*, that the telegram was a forged instrument under s. 38 of the Forgery Act, 1861.

HAWKINS, J.—In IV "Blackstone's Commentaries," 247, **forgery** at common law is defined as "**the fraudulent making or alteration of a writing to the prejudice of another man's right.**" I seek for no other definition for the purposes of the present discussion. That a postal telegram is a writing is to my mind clear. It originates in a written message addressed and signed by the sender, and delivered by him into the post-office of despatch for the express purpose that it shall, in the very words in which it is penned, be transmitted by means of an electric wire to another post-office, which I will call the arrival office, and that it shall there again on its arrival be committed to writing *verbatim et literatim*, and that such last-mentioned writing shall be handed to the person to whom it is addressed. The writing delivered in at the office of despatch is the authority of the postmaster at the arrival office to commit it to writing and to deliver it to the addressee as the sender's written message to him. This message sent from the arrival office is, in my opinion, as binding upon the sender as though he had written it with his own hand. If I am right in this, it follows that an offer by telegram accepted by telegram might well create a contract sufficient to satisfy the Statute of Frauds

(*a*) Now replaced by s. 7 (a) of the Forgery Act, 1913.

between the sender and the addressee, and a verbal offer accepted by telegram might create an ordinary contract. For this there is the authority of the Court of Common Pleas so long ago as 1870: see *Goodwin* v. *Francis* (*b*).

Assuming the telegram to be such a writing as I have stated, a bare reading of the contents of it, coupled with the admission of its falsity and of the purpose for which it was made, are overwhelming to establish that it was fraudulently made to the prejudice of another man's right, and thus a forgery at common law. For this I need only cite the judgment of Blackburn, J., in *R.* v. *Ritson* (*c*): "When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with a fraudulent intent, it is a forgery at common law." The more vexed questions, however, are whether the writing can be treated as an instrument, and, if so, whether it is such an instrument as is contemplated by the 38th section, the contention for the prisoner being that it cannot properly be treated as an instrument at all, and that, even if it can, that the 38th section has reference only to such forged legal or commercial instruments as are mentioned and the forgery of which is made felony in the earlier sections of the statute. After much consideration, I have formed an opinion adverse to the prisoner on both these points.

Now, can this telegram properly be called an instrument? I am not aware of any authority for saying that in law the term "instrument" has ever been confined to any definite class of legal documents. . . . It will not, of course, be denied that there are many instruments of an important character, commercial and otherwise, the forgery of which constitutes only offences at common law. I do not, for instance, find that the forgery of an ordinary written contract (not under seal or specially named in the statute) is a felony. So also a certificate of ordination, though the forgery of it is a mere common law offence, was nevertheless spoken of as an instrument by Black-

(*b*) L. R. 5 C. P. 295.
(*c*) L. R. 1 C. C. R. 200 at p. 204.

burn, J., in *R.* v. *Morton* (*d*). I call attention to these undeniable facts for the purpose of showing that there are many written documents of an important character beyond those mentioned in s. 38 to which the words "any instrument whatsoever" used in that section apply in addition to those documents mentioned in the statute.

In my view of the case, the telegram in question is an *instrument of contract*; it is the instrument which completed the wager offered by Crompton and Radcliffe to those who were able and disposed to accept it (see *Carlill* v. *Carbolic Smoke Ball Co., Ltd.* (*e*), and cases there cited), and thenceforth an obligation was imposed upon each party in honour to fulfil it according to the result of the race. I say *in honour* because, though it was clearly not an illegal contract, it could not be enforced by any legal process. In virtue of it and upon the assumption that the telegram was what it purported to be, Messrs. Crompton and Radcliffe paid the £9.

Assuming the document to be an "instrument," I come to the only remaining question, whether it is such within the meaning of s. 38 of the statute. Why should it not be so? It is contended that the section has reference only to such instruments as are mentioned in the earlier sections of the statute, and that s. 38 applies only to those forged instruments which are punishable as felonies.

Such a construction is, I think, erroneous. There is no definition of the word "instrument" in the statute to fetter us in giving to it the ordinary and general interpretation. It was clearly the intention of the Legislature by s. 38 to create a new offence.

If it had been the intention of the Legislature to limit the operation of the section to felonious forgeries how easy it would have been to use appropriate language for that purpose.

So far from doing this, the Legislature, having used the term "instrument" in a variety of senses all falling within one or another of the definitions I have above referred to, proceeds, in s. 38, to use language which read in its ordinary sense

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(*d*) L. R. 2 C. C. 22.
(*e*) [1892] 2 Q. B. 484; [1893] 1 Q. B. 256.

comprises *every description of written instrument*. What simpler, stronger, or more comprehensive words could they have employed than "*any forged* or altered (*f*) instrument *whatsoever*" to convey an intention that *every forged* instrument should be covered by it, whether the forgery was a felony by statute or a misdemeanour at common law?

112.

R. v. CLOSS.

(1858) 1 D. & B. 460 (C. C. R.)

Forgery. [The facts appear from the judgment.]

COCKBURN, C.J.—The defendant was indicted on a charge, set out in three counts of the indictment, that he had sold to one Fitzpatrick a picture as and for an original picture painted by Mr. Linnell, when in point of fact it was only a copy of a picture which Mr. Linnell had painted; and that he passed it off by means of having the name "J. Linnell" painted in the corner of the picture, in imitation of the original one, on which that name was painted by the painter. Upon the first count, for obtaining money by false pretences, the defendant was acquitted; the second was for a cheat at common law; and the third was for a cheat at common law by means of a forgery. As to the third count we are all of opinion that there was no forgery. **A forgery must be of some document or writing**; and this was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the picture being his. As to the second count we have carefully examined the authorities, and the result is that we think **if a person, in the course of his trade, openly and publicly carried**

(*f*) The words "or altered" are not contained in s. 7 (a) of the Act of 1913, but by s. 1 (2) (a) a document is false within the meaning of the Act if any material alteration . . . has been made therein. See *Note*, *post*, p. 213.

on, were to put a false mark or token upon an article, so as to pass it off as a genuine one when in fact it was only a spurious one, and the article was sold and money obtained by means of that false mark or token, that would be a cheat at common law. As for instance . . . if a man sold a gun with the mark of a particular manufacturer upon it, so as to make it appear like the genuine production of that manufacturer, that would be a false mark or token, and the party would be guilty of a cheat, and therefore liable to punishment if the indictment were fairly framed so as to meet the case; and therefore, upon the second count of this indictment, the prisoner would have been liable to have been convicted if the indictment had been properly framed.

113.

R. v. JOHN SMITH.

(1858) D. & B. 566 (C. C. R.).

The prosecutor, George Borwick, sold powders, called "Borwick's Baking Powders," in packets enclosed in wrappers on which was printed a lengthy description of the merits of the powders. The prisoner had printed 10,000 wrappers which, as the jury found, so closely resembled those of Borwick as to deceive persons of ordinary observation, and in these wrappers he sold his own powders. *Held*, that the prisoner could not be convicted of forgery.

Pollock, C.B.—We are all of opinion that this conviction is bad. The defendant may have been guilty of obtaining money by false pretences; of that there can be no doubt; but the real offence here was the enclosing the false powder in the false wrapper. The issuing of the wrapper without the stuff within it would be no offence. In the printing of these wrappers there is no forgery, nor could the man who printed them be indicted. . . . They are merely wrappers, and in their present shape I doubt whether they are anything like a document or instrument which is the subject of forgery at common law.

Bramwell, B.—I think that this was not a forgery. **Forgery supposes the possibility of a genuine document, and**

that the false document is not so good as the genuine document and that the one is not so efficacious for all purposes as the other. In the present case one of these documents is as good as the other—the one asserts what the other does—the one is as true as the other, but one gets improperly used. . . . The prisoner may have committed a gross fraud in using the wrappers for that which was not the genuine powder, and may possibly be indicted for obtaining money by false pretences, but I think he cannot be convicted of forgery.

114.

R. v. WILLIAM RITSON AND SAMUEL RITSON.

(1869) L. R. 1 C. C. R. 203.

A. and B. fraudulently antedated a deed of conveyance in order to give it priority over a subsequent conveyance. *Held*, that they were guilty of forgery.

BLACKBURN, J.—By 24 & 25 Vict. c. 98, s. 20 (*a*), it is felony to "forge" any deed with intent to defraud. The material word in this section is "forge." There is no definition of "forge" in the statute, and we must therefore inquire what is the meaning of the word. The definition in Comyns (Dig., tit. "Forgery" A.I.) is **"forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another"**—not making an instrument containing that which is false, which, I agree with Mr. Torr, would not be forgery, but making an instrument which purports to be that which it is not. Bacon's Abr. (tit. "Forgery," A.), which, it is well known, was compiled from the MS. of Chief Baron Gilbert, explains forgery thus: "The notion of forgery doth not so much consist in the counterfeiting of a man's hand and

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(*a*) Now replaced by s. 2 (1) (b) of the Act of 1913.

seal . . . but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have." The material words, as applicable to the facts of the present case, are " to make a man's own act appear to have been done at a time when it was not done." **When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with fraudulent intent, it is a forgery at common law.**

Ordinarily the date of a deed is not material, but it is here shown by extrinsic evidence that the date of the deed was material. Unless the deed had been executed before the 5th May it could not have conveyed any estate in the land in question. The date was of the essence of the deed, and as a false date was inserted with a fraudulent intent the deed was a false deed, within the definition in Bacon's Abridgement. This is a sufficient authority.

If, however, there were no authority, I think that the principle I have mentioned is right and expedient. Besides this, however, Coke (3 Inst. 169), speaking of forgery before the statute of 5 Eliz. c. 14, states that the principle of forgery does apply to a case like this, and that to make a deed purporting to bear a false date may be a forgery. To the same effect is Sir M. Foster in *Lewis's Case* (*b*), where all the judges in consultation assumed that ante-dating a deed might be forgery.

All the text books agree, and there is no single authority against the definition I have stated. Mr. Torr, however, says that the definition is old. I think that this gives it all the greater weight.

(*b*) Foster's Crown Cases, 116.

115.

R. v. MARTIN.

(1880) 5 Q. B. D. 34.

Robert Martin met Lee, to whom he had been for many years well known, and agreed to buy from him a pony and carriage. Martin, in the presence of Lee, produced a form of cheque, and filled it in, signing it with the name of *William* Martin. Lee took it without looking at it or noticing the signature. The cheque was drawn on bankers with whom Martin formerly had an account in his proper name of Robert Martin, but the account was now closed and accordingly on presentation of the cheque payment was refused. *Held*, that Martin was not guilty of forgery.

[Case reserved by COCKBURN, C.J.]—"The prisoner in drawing this cheque and delivering it to the prosecutor did not do so in the name of, or as representing any other person, real or fictitious. The cheque was drawn and uttered as his own, and it was so received by the prosecutor, to whom the prisoner was perfectly well known as an acquaintance of twenty years' standing, and by whom he was seen to sign it. The prisoner did not obtain credit with the prosecutor by substituting the Christian name of William for that of Robert. He would equally have got credit had he signed his proper name of Robert. **The credit was given to the prisoner himself, not to the name in which the cheque was signed; the cheque was taken as that of the individual person who had just been seen to sign it, not as the cheque of Wm. Martin, as distinguished from Robt. Martin, or of any other person than the prisoner.** On the contrary, if the prosecutor, who knew the prisoner's name to be Robert, had observed that the signature was in the name of William, he would in all probability have suspected something wrong, and would have refused to take the cheque.

"There was nothing whatever from which the motive of the prisoner in signing a wrong Christian name could be gathered. There happened indeed to be a Wm. Martin, a customer of the bank; but this was unknown to the prisoner; besides which, as the prisoner was perfectly aware that his person and true name

were well known to the prosecutor, it could not be supposed that he intended to pass himself off as, or the cheque as the cheque of, any William Martin other than himself. The only motive which has occurred to my mind as one which might have induced him to sign a false Christian name is, that he may have thought that by so doing he might avoid being liable on the cheque when payment had been, as it was certain to be, refused. This, however, amounts to no more than conjecture. Be it as it may, and whatever may have been the motive, it occurred to me that while there had been a fictitious signature to the cheque in question, so far as the Christian name was concerned, yet the signature having been affixed by the prisoner, and the cheque delivered by him as his own, though there had been a signature in a fictitious name, the name could not be said to be that of a fictitious person, and that in this respect the case did not fall within the principle of the cases in which it has been held that the use of the pretended name of a fictitious person amounts to forgery. I have therefore sought the assistance of the Court as to whether, under the circumstances, the affixing a fictitious Christian name to this cheque by the prisoner amounts to forgery as charged in the indictment."

No counsel appeared to argue the case.

HAWKINS, J., referred to *Dunn's Case* (*a*).

COCKBURN, C.J.—The case is concluded by authority. In *Dunn's Case* (*a*) it was agreed by the judges that "**in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third person.**" Upon authority, as well as upon principle, it is clear that this conviction should be quashed.

(*a*) 1 Leach 59.

116.

R. v. ROGERS.

(1838) 8 C. & P. 629 (C. C. R.).

The prisoner was indicted for uttering a bill of exchange on which a forged acceptance was written, with intent to defraud the prosecutor. The acceptance on the bill purported to be that of a firm of T. Nicholson & Co., who were represented by the prisoner to be a firm of general merchants at Ipswich. In fact, however, no such firm existed. For the defence it was stated that the acceptance was written by an individual named T. Nicholson, and it was submitted that the mere addition by him of the words "and Co." to his signature did not constitute a forgery. T. Nicholson had been subpœnaed to prove his signature, but did not appear.

Bosanquet, J., in summing up, said.—The first question is whether the acceptance is a forgery. Upon that point, if you think that it was not written by T. Nicholson, the case is relieved from doubt or difficulty. But it is said, on the part of the prisoner, that if it was written by T. Nicholson it is no forgery. I have no doubt, however, that **the writing of an acceptance of an existing person without authority, or of the name of a firm or person non-existing, in acceptance of a bill of exchange, with intent to defraud, is a forgery**; and my opinion is, that if this acceptance was written by Nicholson to represent a fictitious firm, and with intent to defraud, it would amount to a forged acceptance.

117.

R. v. GEACH.

(1840) 9 C. & P. 504.

G. sent to his bankers a bill of exchange on which he had forged an acceptance. The bankers, believing the acceptance to be genuine, discounted the bill. G. was indicted for forging and uttering. *Held*, that it was no defence that he intended to pay or that he had in fact paid the bill.

Parke, B.—Upon the questions, whether the acceptance is a forgery, and whether the prisoner knew it to be so, there can be no question, if you believe the evidence of Mr. Edmund

Williams; and with respect to the intent to defraud, I have no doubt that you will take the law from me, which is this, that a person is guilty of forgery notwithstanding he may himself intend ultimately to take up the bill, and may suppose that the party whose name is forged will be no loser. If in the present case, you are satisfied that the prisoner knew this acceptance to be forged and uttered it as true, and believed that the bankers would advance money on it, which they would not otherwise do, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act. It appears that this bill has since been paid by the prisoner; but that will make no difference if the offence has been once completed at the time of the uttering.

118.

R. v. EDWARD WILSON.

(1847) 2 C. & K. 527.

The prosecutor signed a blank cheque and gave it to the prisoner, his clerk, directing him to fill in a sum which he had to ascertain by calculation, to cash it and pay the proceeds to W. The prisoner did not do so, but filled in the cheque with the sum of £250, cashed it, and retained the whole of the proceeds in satisfaction of a claim for salary which he alleged to be due to him. On the next day the prisoner sent to the prosecutor an account of his claim, giving him credit for the sum received on the cheque.

For the prisoner it was objected that as he was directed to fill it up for a specified sum, the filling up for a different sum, though it was a breach of trust, could not be considered as a forgery.

Coltman, J.—I think, on the authority of the cases of *R.* v. *Minter Hart* (*a*) and *R.* v. *Bateman* (*b*) that this is a forgery.

(*a*) 7 C. & P. 652. In that case it was held that if a person, having the blank acceptance of another, be authorized to write on it a bill of exchange for a certain limited amount, and he write on it a bill of exchange for a larger amount, with intent to defraud either the acceptor or any other person, this is forgery.

(*b*) 1 Cox C. C. 186. In that case, which was a charge of forgery arising on the filling up of a blank cheque, Erle, J., said: "If a cheque is given to a person with a certain authority, the agent is confined strictly

It was further contended for the prisoner that there was no proof of an intention to defraud the prosecutor, but only to obtain from him a sum of money which the prisoner might honestly have supposed to be due to him. On this point Coltman, J. (in summing up) told the jury that if they were satisfied that the prisoner was authorised only to fill up the cheque for the amount (to be ascertained by him) and to pay the proceeds to W., and that he filled it up for a larger sum and applied the money when received to his own purposes, that was evidence for their consideration of an intent to defraud the prosecutor.

Note.—Forgery is now defined as follows by s. 1 of the Forgery Act, 1913.

(1) For the purposes of this Act forgery is the making of a false document in order that it may be used as genuine, and in the case of the seals and dies mentioned in this Act, the counterfeiting of a seal or die, and forgery with intent to defraud or deceive is punishable as in this Act provided (*c*).

(2) A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making; or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false—

(a) if any material alteration, whether by addition, inser-

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within the limits of that authority, and if he choose to alter it, the crime of forgery is committed. If the blank cheque was delivered to him with a limited authority to complete it, and he filled it up with an amount different from the one he was directed to insert; and if, after the authority was at an end, he filled it up with any amount whatsoever, that too would be clearly forgery."

(*c*) By ss. 2 and 3, the forgery of certain specified documents with intent to defraud, or, in some cases, with intent to defraud or deceive, is made a felony. These sections specify almost every conceivable kind of document; but by s. 4 the forgery of any document not made felony by this or any other statute, if committed with intent to defraud, or, in the case of a public document, with intent to defraud or deceive, is a misdemeanour. By s. 5 the forgery of various seals and dies is a felony.

tion, obliteration, erasure, removal, or otherwise, has been made therein;

(b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person;

(c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it.

119.

R. v. JOSEPH MARTIN.

(1827) 3 C. & P. 211.

The prisoner was charged with the manslaughter of a child. The father of a child kept a public-house: the prisoner went there to drink, and, having been served with a quartern of gin, he put the glass to the mouth of the child with his left hand, holding the child with his right hand; the child twisted the glass out of his hand, drank the whole quartern of gin, and, as a result, died within a few hours.

VAUGHAN, B.—As it appears clearly that the drinking of the gin in this quantity was the **act of the child,** the prisoner must be acquitted: but if it had appeared that the prisoner had willingly **given** a child of this tender age a quartern of gin, out of a sort of brutal fun, and had thereby caused its death, I should most decidedly have held that to be manslaughter (*a*).

(*a*) See also *R.* v. *Smith*, 8 C. & P. 160, *post*, p. 219, and *R.* v. *Packard*, *post*, p. 225.

120.

R. v. MORBY.

(1881) 8 Q. B. D. 571.

A.'s son died of smallpox. A. was a member of a religious sect which did not believe in medical aid, and had not therefore obtained any medical advice or attendance. It was proved that medical assistance might have saved the child's life and would have increased its chances of recovery, but there was no positive evidence that the death was caused or accelerated by the neglect to provide medical aid. *Held*, by the Court for Crown Cases Reserved, that A could not be convicted of manslaughter.

Lord Coleridge, C.J.—It is not enough to show neglect of reasonable means for preserving or prolonging the child's life, but **to convict of manslaughter it must be shown that the neglect had the effect of shortening life.** The medical witness called for the prosecution gave his evidence clearly and well, and under a high sense of his duty and responsibility, and what he stated was, that in his opinion the chances of life would have been increased by having medical advice, that life might possibly have been prolonged thereby, or, indeed, might probably have been, but he could not say that it would, or indeed that it would probably have been prolonged thereby. In order to sustain the conviction affirmative proof is required; this the skilled witness called, and upon whose evidence the matter rests, cannot, from the nature of the case, give, and indeed, properly declines to give. The direction of the learned Judge, though right in point of law, is not applicable to the facts proved. The conviction cannot be sustained.

Grove, J.—The Judge seems to have considered that proof of the mere possibility of medical aid being of use in cases such as the one in question was not enough, that "might," in fact, was not enough, and leaves the matter to the jury, asking them to answer the question which the skilled witness said he could not. This they do, but there really was no satisfactory evidence for them, and the conviction ought not to stand.

Stephen, J.—I am of the same opinion. Under s. 37 of 31 & 32 Vict. c. 122, it may be the prisoner could have been

convicted of neglect of duty as a parent, but **to convict of manslaughter you must show that he caused death or accelerated it.**

121.

R. v. DYSON.

[1908] 1 K. B. 454.

Homicide—Death accelerated by prisoner. [The facts appear from the judgment.]

Judgment of the Court of Criminal Appeal, delivered by:

Lord Alverstone, C.J.—The prisoner was indicted for the manslaughter of his child, who died on March 5, 1908. There was evidence that the prisoner had inflicted injuries upon the child in November, 1906, and certain further injuries in December, 1907. The jury convicted the prisoner, who appeals against that conviction upon the ground that the Judge misdirected the jury in that he left it to them to find the prisoner guilty if they considered the death to have been caused by the injuries inflicted in 1906. That was clearly not a proper direction, for, whatever one may think of the merits of such a rule of law, **it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death does not occur within a year and a day after the injury was inflicted, for in that event it must be attributed to some other cause. . . . The proper question to have been submitted to the jury was whether the prisoner accelerated the child's death by the injuries which he inflicted in December, 1907. For if he did, the fact that the child was already suffering from meningitis, from which it would in any event have died before long, would afford no answer to the charge of causing its death:** *R.* v. *Martin* (*a*).

(*a*) 5 C. & P. 128.

122.

R. v. PITTS.

(1842) C. & M. 159.

The prisoner was indicted for murder. The body of the deceased was found in a river and, though it bore marks of violence, death had been produced by drowning and not by the injuries. The evidence was that the prisoner had endeavoured to rob the deceased, that a scuffle took place, and that the deceased either threw himself into the river for escape or was thrown into the river by the prisoner.

ERSKINE, J. (in summing up).—A man may throw himself into a river under such circumstances as render it **not a voluntary act**; by reason of force, applied either to the body or the mind. It then becomes the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well-grounded from the circumstances by which the deceased was surrounded; not that you must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might take. Here, all the circumstances show that, even if the deceased did throw himself into the river, it must have been from circumstances arising out of a scuffle with the prisoner . . . or from apprehension of further violence.

123.

R. v. BULL.

(1839) 9 C. & P. 22.

The prisoner was indicted for the murder of William Rushbrooke. The deceased was one of a party of six persons who had been drinking together at several public-houses. Going home they met the prisoner on the highway between 12 and 1 o'clock at night. A scuffle of some kind took place and the prisoner stabbed the deceased. The plea set up on his behalf was that he acted in self-defence.

VAUGHAN, J., in his summing-up, said, that it was **not justifiable homicide unless there was an intention on the part of the deceased and his companions to rob or murder the**

prisoner, or to do some dreadful bodily injury to him; and that it was not the law that a man would be justified in taking away the life of another merely because he feared that he might be assaulted, or indeed, if he were actually assaulted. His Lordship told the jury that the question for their consideration was whether the conduct of the party made it **necessary** for the prisoner to inflict that blow which almost immediately terminated in the death of the deceased —whether he inflicted the wound in self-defence, to save his own life, which was in danger, or to protect himself from some dreadful bodily injury.

124.

R. v. ROSE.

(1884) 15 Cox, C. C. 540.

John Rose, who was an exceedingly powerful man, was killed by his son, a weakly young man of about 22 years of age, in the following circumstances. He had frequently threatened to kill his wife: on the occasion in question he violently assaulted her, threatened to cut her throat, and went to his room saying that he was going to fetch a knife, which, as the family knew, he kept there; he rushed back, seized his wife and held her in such a position that he might reasonably have been thought to be cutting her throat. The wife and daughters shouted "Murder!" and the son, running out of his room, saw his mother and father in this position and fired a shot which killed his father. On his arrest he said: "Father was murdering mother. I shot on one side to frighten him; he would not leave her, so I shot him." No trace was, however, found of any other bullet. No evidence was given to show that the deceased man actually had the knife in his hand. The son was indicted for manslaughter.

Lopes, J. (summing up).—**Homicide is excusable if a person takes away the life of another in defending himself, if the fatal blow which takes away life is necessary for his preservation. The law says that not only in self-defence, such as I have described, may homicide be excusable, but also it may be excusable if the fatal blow inflicted was necessary for the preservation of life** (*a*). . . . If you think,

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(*a*) In this case it would appear that the homicide would be not only excusable but justifiable. See Archbold's Criminal Pleading and Practice,

having regard to the evidence, and drawing fair and proper inferences from it, that the prisoner at the bar acted without vindictive feeling towards his father when he fired the shot; if you think that at the time when he fired that shot he honestly believed, and had reasonable grounds for the belief, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of life, then he ought to be excused, and the law will excuse him from the consequences of the homicide. If, however, on the other hand, you cannot come to that conclusion if you think, and think without any reasonable doubt, that it is not a fair inference to be drawn from the evidence, but are clearly of opinion that he acted vindictively and had not such a belief as I have described to you, or had not reasonable grounds for such a belief, then you must find him guilty of murder.

125.

R. v. SMITH.

(1837) 8 C. & P. 160.

A dispute arose in a public-house between the prisoner and a man named Cheplin. The prisoner and his brother left the public-house and were followed by Cheplin, who said that if he caught them he would serve them out. A scuffle between the parties took place in an adjoining mews, and Cheplin was in some way stabbed by a bayonet which the prisoner's brother was wearing. The evidence tended to show that Cheplin attacked the prisoner and his brother and was stabbed by the prisoner. It was, however, suggested that the bayonet was knocked out of its sheath during the scuffle, and that Cheplin fell upon it.

Bosanquet, J.—The prisoner stands charged upon the coroner's inquisition with the crime of murder, and is also indicted for the lesser offence of manslaughter. The question for you, on a careful consideration of the whole of the evidence, will be, whether he was guilty of either the one or the other, or whether the circumstances of the case were such as to entitle him to an acquittal; whether he is guilty of

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p. 834. The distinction between justifiable and excusable homicide is, however, no longer of practical importance.

murder or of manslaughter or whether his act was justifiable or excusable. Upon the question whether it amounts to murder you will have to consider this:—**Did the prisoner enter into the contest with an unarmed man, intending to avail himself of a deadly weapon? for if he did, it will amount to murder. But, if he did not enter into the contest with the intention of using it, then the question will be, Did he use it in the heat of passion, in consequence of an attack made upon him? If he did then it will be manslaughter.** But there is another question,—**Did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger.** If he used the weapon, **having no other means of resistance and no means of escape,** in such case, if he retreated as far as he could he will be justified. There is a further question which is raised by the defence, viz., that the death was the result of accident by the deceased in the scuffle falling on the bayonet. This ranges itself under the first question; because, if the fact were so, the death cannot be said to have been occasioned by the **act of the prisoner.**

126.

R. v. SCULLY.

(1824) 1 C. & P. 319.

The prisoner was indicted for manslaughter. He had been set to watch his master's garden, and, seeing a man on the garden wall in the night, hailed him. The man on the wall called out to another man whom the prisoner could not see, "Tom, why don't you fire?" The prisoner hailed again, and the man on the wall said, "Shoot and be d——d!" The prisoner then fired at the man on the wall, but missed him and shot the other man.

GARROW, B.—Any person set by his master to watch a garden or yard is not at all justified in shooting at or injuring

in any way persons who may come into those premises, even in the night, and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened, and **if he considered his life in actual danger, he was justified in shooting the deceased as he had done; but if not considering his own life in danger, he rashly shot this man who was only a trespasser, he would be guilty of manslaughter.**

127.

R. v. KIRKHAM.

(1837) 8 C. & P. 115.

K. was indicted for the murder of his son. The evidence of a witness for the prosecution (named Chorlton) was as follows: "I entered the prisoner's house and saw him and his son wrestling on the floor. I told the son to get up; he did so and went to the door. The prisoner then took up a coal pick which was in the room and threw it at his son. The son said it hurt him, and the prisoner said he would have his revenge. The coal pick flew out into the street and the son fetched it and threw it back into the house, but not at the prisoner. The son was standing at the door when the prisoner took a knife and stabbed him in the left side. The son said, 'Father, you have killed me,' and reeled out into the street. The prisoner said, 'Joe, I will have my revenge,' The son came into the house and the prisoner stabbed him again." Another witness for the prosecution gave evidence that the prisoner had some few days earlier threatened to kill his son.

Coleridge, J.—Every indictment of this kind may receive at the hands of the jury one of three terminations. First, that the prisoner is innocent; secondly, that he occasioned the death in such a way as implies blame but still falls short of wilful murder; and, lastly, the party may be found guilty of murder. Before I go to the minute points of the case, it may be convenient to state the general principles upon which the law turns with regard to this subject. As soon as it is ascertained that one individual in possession of his reason has wilfully taken away the life of another, the law's first pre-

sumption is that the party is guilty of **murder.** This, you know, supposes the act to have been done **maliciously**; but with regard to malice I should tell you, that it is not necessarily meant by that term that at the moment the party killing has an old or present grudge against the deceased—it is not at the moment he takes away life, he is acting on some deliberate design. It is only that the party has done the act **knowing that he does it, and that the means are such as, in all human reason, are likely to produce death. If I were to take a loaded pistol and fire it into that crowd, who are entirely strangers to me—if I did that act deliberately and death ensued, I should be guilty of murder.** The law would say that I did it with malice prepense. I could not do it without having bad feelings and a reckless heart. **Everyone must be presumed to intend the natural consequence of his acts.** If you throw a stone at a window it must be taken that you intend to break it, because it is a brittle substance. That being so, if you had heard nothing more than simply that the prisoner, taking a knife in his hand, had stabbed his son, that would have put it on him to clear himself from the charge of murder. The law requires from him and will allow him to show that there was some mitigating circumstances, which alter the presumed character of the act, because it has at once a sacred regard for human life and also a respect for man's failings and will not require more from an imperfect creature than he can perform; and, therefore, as it is well known that there are certain things which so stir up man's blood that he can no longer be his own master, the law makes allowance for them. **If,** therefore, **a person being stung and excited inflicts a blow or wound, provided the provocation be sufficient, and acting upon him at the time, and recent, he will only be guilty of manslaughter;** and in this the law does not depart from its original principle, because it then supposes that the individual was not guilty of malice prepense, but that what he did was done in a moment of overpowering passion, which prevented the exercise of reason; so that the general distinction is this: in the one case the man is cool, and must be taken to have malice; in the other, if he has had

sufficient provocation, and has acted from that provocation while it is fresh, then he has not malice. In some instances you must feel certain, from the acts of the party, that he had a grudge. Suppose a man destroyed another by poison; if it were proved that he had previously bought the poison and prepared the cup, although he should have had a quarrel with the party at the very time of administering it, you could not doubt that there was express and actual malice. If a person has received a blow, and in the consequent irritation immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for what he does; and, therefore, as in the case of poisoning, though there have been an actual quarrel, and the deceased shall have given a great number of blows, yet if the party inflict the wound, not in consequence of those blows, but in consequence of previous malice, all the blows would go for nothing. So in the present case, if there was a stab given in consequence of a grudge entertained a day or two before, all that passed between these parties at the very time must go for nothing, for the simple reason that the blows were not the cause of the crime. So that if you believe that on the Monday or Wednesday before the prisoner used threats which have been sworn to, deliberately, then all the quarrel and the wrestling may be entirely dismissed from your consideration. I for one, however, am not disposed to pay much attention to declarations of this description. In some cases they may be deserving of consideration, but last of all if they proceed from a passionate man in that situation of life in which the prisoner is. Then I will suppose that all was purely unpremeditated until Chorlton came, and then the case will stand thus—the father and son have a quarrel, the son gets the father down, the son has the best of it, and the father has received considerable provocation; and if, when he got up and threw the pick at the deceased he had at once killed him, I should have said at once that it was manslaughter. Now comes the more important question (the son having given no further provocation), whether in truth that which was in the first instance sufficient provocation was so

recent to the actual deadly blow that it excused the act that was done, and whether the father was acting under the recent sting, or had had time to cool, and then took up the deadly weapon. I told you just now he must be excused if the provocation was recent and he acting on its sting, and the blood remained hot, but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows—because the law condescends to human frailty it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions (*a*).

128.

R. v. CONNER.

(1836) 7 C. & P. 438.

A mother, being angry with one of her children, threw at him a small piece of iron, intending not to hit him but only to frighten him. The iron hit and killed another child who was entering the room. *Held*, to be manslaughter.

PARK, J. (in summing up).—No doubt this poor woman had no more intention of injuring this particular child than I have; but that makes no difference in law. When a blow intended for A. lights upon B., being given in a sudden transport of passion, if, supposing A. had been struck and had died, it would have amounted to manslaughter, it is no less manslaughter if it caused the death of B. **If a blow is aimed at an individual unlawfully—and this was undoubtedly unlawful, as an improper mode of correction—and strikes another and kills him, it is manslaughter.**

(*a*) For other cases on provocation, see *post*, pp. 242—6.

129.

R. v. PACKARD AND OTHERS.

(1842) C. & M. 236.

A. was in possession of the goods of P. under an execution. P. and the other prisoners plied A. with drink, themselves also drinking heavily, and when A. was very drunk put him into a cabriolet and caused him to be driven about the streets for two hours, which caused his death. They were indicted for manslaughter.

PARKE, B. (in summing up).—With reference to the allegation that the prisoners well knew that the quantity of liquor taken was likely to cause death, there does not appear to be any evidence of this. . . . I agree that if it were essential to prove that the prisoners knew that the liquors were likely to cause the death of the deceased that you could not find your verdict against the prisoners. Such a finding would make the offence approach to murder. . . . The first question will be, whether the prisoners, or any of them, put the deceased into the cabriolet, and upon this, I think, nothing need be said. If you are of opinion that they did, then the questions will be: first, whether they or any of them, were guilty of administering or procuring the deceased to take large quantities of liquor for an unlawful purpose, or whether, when he had taken it, they put him into the cabriolet for an unlawful purpose. If you think that the three prisoners, or one of them, made him excessively drunk to enable the prisoner, John Richard Packard, to prevent the completion of the execution; or if you are satisfied that the object of the prisoners, or any of them, was otherwise unlawful, and that the death of the deceased was caused in carrying their unlawful object into effect, they must be found guilty. The simple fact of persons getting together to drink, or one pressing another to do so, is not an unlawful act, or, if death ensue, an offence that can be construed into manslaughter; and if what took place in the present instance was really and solely for the purpose of good fellowship . . . this will not be a case of manslaughter. . . . Upon the first question I have stated, it

will be essential to make out . . . that the prisoners administered the liquor with the intention of making the deceased drunk, and then getting him out of the house; and if that be doubtful, still, if you think that, when he was drunk, they removed him into the cabriolet with the intention of preventing his returning, and death was the result of such removal, the act was unlawful, and the case will be a case of manslaughter.

130.

R. v. DANT.

(1865) L. & C. 567 (C. C. R.).

The prisoner turned out upon a common, through which passed much-frequented footpaths, a horse which he knew to be vicious, and which kicked and killed a child. The jury were not satisfied whether the child was on or just off a footpath. *Held*, that the prisoner was rightly convicted of manslaughter.

Blackburn, J.—If a man has a horse which he knows to be so vicious as to be dangerous, and nevertheless he turns it out into a field where there are paths, on which to his knowledge people are likely to be, that amounts to negligence: and a sufficient quantity of it will amount to culpable negligence. Nor does it make any matter whether the persons using the highway are on or very near it when the accident happens, *Barnes* v. *Ward* (*a*). It is a **public nuisance** if it is so near as to be dangerous to those using the way with ordinary care. I do not say that there would not have been a case for a conviction although the child had strayed to a considerable distance from the path (*b*).

(*a*) 9 C. B. 392.

(*b*) On this point Mellor, J., and Montague Smith, J., agreed; Erle, C.J. and Channell, B., expressing no opinion.

130A.

R. v. BURDEE.

(1917) 86 L. J. K. B. 871.

The appellant was by profession a violinist, but had for some years been interested in herbalism and fasting as a cure for rheumatism, and in April or May, 1916, he started giving advice for which he charged fees. In July, 1916, he gave advice to a Mrs. B., a confirmed invalid, who in accordance with his instructions abstained from food for several days, when she died. The medical evidence was that death was caused by heart failure due to disease of the heart, but accelerated by lack of food. *Held*, that the appellant was guilty of manslaughter.

Judgment of the Court of Criminal Appeal delivered by:—

DARLING, J.—It is highly probable that she (Mrs. Becherson) would not have lived very long; but all the evidence goes to show that she would probably have lived longer if the appellant had not attended her—that, in fact, his treatment shortened her life. No person has the right to shorten by an hour the life of another except by lawful authority, as, for example, when sentence of death has been passed.

The question for this Court is whether there was evidence on which the appellant could properly be convicted of manslaughter. The directions given by the learned Judge at the trial followed the rule laid down by Lord Chief Justice Ellenborough in *R.* v. *Williamson* (*a*), where he says, "To substantiate that charge"—that is, manslaughter—"the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention." I do not myself think that Lord Ellenborough used the words "most criminal inattention"; but if he did, they are taken from a summing-up to the jury, and if he had been delivering judgment he would not have discriminated between inattention which was most criminal and only slightly criminal. The rule is also laid down in a way which we all think adequate in *R.* v. *Spiller* (*b*), where Baron Bolland says, "As to the question, whether it be manslaughter or not, the Judges have

(*a*) 3 C. & P. 635. (*b*) 5 C. & P. 333.

considered, that any person, whether licensed or unlicensed, who deals with the life or health of any of his Majesty's subjects, is bound to use competent skill, and sufficient attention; and if the patient dies for the want of either, the person is guilty of manslaughter." That *dictum* was contained in the ruling of the Judges. In summing up he said, "The law, as I am bound to lay it down . . . is this—if any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention, and assiduity." Where the man indicted is a qualified medical man it might be difficult to prove that he had not the requisite skill, as if he had not some skill he would not have passed his examination; but such a person might conceivably not apply his skill in a proper manner. In the present case we are dealing with a person having no medical knowledge; his answers given in evidence show that he is ignorant over and above most people. He imagined that he could cure a difficult disease by fantastic means, but he knows nothing about disease of the heart, and did not examine the patient's heart before prescribing treatment. He adopted a stereotyped practice of prescribing cold water and fasting, with the result, according to the evidence, that she died prematurely. The verdict was therefore justified by law and by the facts adduced in evidence.

131.

R. v. SALMON.

(1880) 6 Q. B. D. 79, 25 (C. C. R.).

A., B. and C. went into a field near roads and houses for the purpose of practising with a rifle which would be deadly at a mile. B. in the presence of C. placed in a tree as a target a board handed to him by A. A., B. and C. all fired at this board, and a shot fired by one of them—it was not proved by which—killed a boy in a garden about a quarter of a mile away. *Held*, that they were all rightly convicted of manslaughter.

Lord Coleridge, C.J.—The conviction must be affirmed. **If a person will, without taking proper precautions, do an act**

which is in itself dangerous, even though not an unlawful act in itself, and if in the course of it he kills another person, he does a criminal act which in law constitutes manslaughter. It was manslaughter in him who killed the boy. The death resulted from the action of the three, and they are all liable.

FIELD, J.—I am of the same opinion. I had some doubt as to whether there was any duty owed by the prisoners to the particular boy, but it seems to me that **there is a general duty to the public** of which the prisoners committed a breach. They had a duty **not to use a weapon likely to cause death or injury in an improper place and without taking proper precautions to avoid injury.** The evidence shows that the duty was not observed. The character of the place and the probability of persons being about was such that I am satisfied the conviction was right.

STEPHEN, J.—**Manslaughter is unlawful homicide not amounting to murder. It is unlawful where caused by the culpable omission to discharge a duty tending to the preservation of life. There is a duty tending to the preservation of life to take proper precautions in the use of dangerous weapons or things. It is the legal duty of everyone who does any act, which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it.** Firing a rifle under circumstances such as in the present case was a highly dangerous act, and all are responsible, for they unite to fire at the spot in question, and they all omit to take any precautions whatever to prevent danger.

132.

R. v. WILLIAM WALKER.

(1824) 1 C. & P. 320.

The prisoner was charged with the manslaughter of C., who was walking along a road in a state of intoxication. The prisoner was driving a cart, drawn by two horses, without reins, and was sitting in front of the cart. He called out twice to C. to get out of the way, but the deceased, owing to his intoxication and the pace of the horses, was unable to do so.

GARROW, B., laid down, that **if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he**

calls repeatedly to such person to get out of the way, if, from the rapidity of the driving, *or any other cause,* **the person cannot get out of the way in time enough but is killed, the driver is in law guilty of manslaughter.**

133.

R. v. SWINDALL AND OSBORNE.

(1846) 2 C. & K. 230.

The prisoners were charged with the manslaughter of an old man. They were together, each driving a horse and cart at a furious pace and encouraging the other to do the like. One or both of the prisoners drove over the old man and killed him.

Pollock, C.B. (in summing up).—**The prisoners are charged with contributing to the death of the deceased, by their negligence and improper conduct, and if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. . . .** Generally it may be laid down that, where one by his negligence has contributed to the death of another, he is responsible; therefore you are to say by your verdict whether you are of opinion that the deceased came to his death in consequence of the negligence of one or both of the prisoners. A distinction has been taken between the prisoners: it is said that the one who went first is responsible, but that the second is not. . . . But when two persons are driving together, encouraging each other to drive at a dangerous pace, then whether the injury is done by the one driving the first or the second carriage, I am of opinion that in point of law the other shares the guilt.

134.

R. v. HAINES.

(1847) 2 C. & K. 368.

Negligence. (The facts appear from the judgment.)

Maule, J. (in summing up).—The prisoner is charged with manslaughter, and it is imputed that, in consequence of his omission to do his duty, a person . . . lost his life. It appears that the prisoner acted as ground bailiff of a mine, and that, as such, his duty was to regulate the ventilation and direct where air-headings should be placed; and the questions for you to consider are, whether it was the duty of the prisoner to have directed an air-heading to be made in this mine; and whether, by his omitting to do so he was guilty of a **want of reasonable and ordinary precaution. If you are satisfied that it was the ordinary and plain duty of the prisoner to have caused an air-heading to be made in this mine, and that a man using reasonable diligence would have had it done, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter.** It has been contended that some other persons were, on this occasion, also guilty of neglect. Still, assuming that to be so, their neglect will not excuse the prisoner; for, if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter; and it is no defence for one who was negligent to say that another was negligent also.

135.

R. v. SHEPHERD.

(1862) L. & C. 147 (C. C. R.).

The prisoner was convicted of the manslaughter of her daughter, a girl of eighteen years of age. The prisoner had, four years previously, married a second husband, who was not the father of the deceased. After the marriage the deceased went out to service, sometimes returning home when she was out of a place. While she was at home she was, in the absence of her stepfather, taken in labour and her mother, having no means, did not send for a midwife, in consequence of which the girl died.

ERLE, C.J.—The facts of the case are, that the prisoner did not procure the aid of a midwife for her daughter during childbirth. In consequence of her omitting to do so a difficulty occurred, and death ensued. **Was there a breach of duty for which she would be responsible in a criminal Court in not obtaining that aid. . . .** The cases where the person, whose death is caused, has been brought into circumstances where he cannot help himself, as by imprisonment by the act of the party charged, are clearly distinguishable. There the persons imprisoned are helpless, and their custodians, by the fact of their being so, have charged themselves with the support of their prisoners. The case of parent and child of tender years is also distinguishable, as are the other cases where such a duty is imposed by law or contract, as in the case of master and apprentice. **Here the girl was beyond the age of childhood and was entirely emancipated. Then, being in the prisoner's house, she is brought to bed, and the mother omits to procure her a midwife. I cannot find any authority for saying that that was such a breach of duty as renders her, in the event which ensued, liable to the consequences of manslaughter.**

WILLIAMS, J.—I am of the same opinion and for the same reasons. **There was no legal duty binding the prisoner to procure the aid of a midwife.**

136.

R. v. CHARLOTTE SMITH.

(1865) L. & C. 607 (C. C. R.).

Homicide by neglect. (The facts appear sufficiently from the judgment.)

Erle, C. J.—The prisoner was indicted for causing the death of Martha Turner, a servant in her employ; and the unlawful act alleged to have conduced to the death of the deceased was the neglecting to supply her with proper food and lodging at a time when the deceased was reduced to such a state of body and mind as to be helpless and unable to take care of herself, or was so under the dominion and restraint of the prisoner as to be unable to withdraw herself from her control. **Now, the law clearly is that, if a person has the custody and charge of another and neglects to supply proper food and lodging, such person is responsible, if from such neglect death results to the person in custody;** but it is also equally clear that, when a person, having the free control of her actions and able to take care of herself, remains in a service where she is starved and badly lodged, the mistress is not criminally responsible for any consequences that may ensue. The question in the present case is, whether there is evidence that the deceased was reduced to such a state of body and mind as to be helpless and unable to take care of herself, or that she was so under the dominion of her mistress as to be unable to withdraw herself from her control.

Blackburn, J.—**To render a person who has the charge of another criminally responsible for neglect, such as is alleged in this case, there must be, on the part of such person, a duty arising from the helpless character of the person who is under control.** Such a duty, for instance, arises in the case of those who have charge of infants, invalids, or lunatics. So also such a duty arises where the person exercising the restraint exercises it to such a degree as to entirely deprive the person who is subject to it of all liberty whatever. In cases of this

sort, there is, no doubt, a duty raised to supply proper food and lodging, a duty which arises not solely from contract, but is of such a nature as to make a person who neglects it criminally responsible for so doing.

137.

R. v. MARRIOTT.

(1838) 8 C. & P. 425.

Mrs. Warner was a lady of about seventy-four who lived with her sister Mrs. Reepe. On the death of Mrs. Reepe a grandson, Charles Reepe, offered to take charge of Mrs. Warner. Marriott, however, claimed to be executor of Mrs. Reepe and said "Mrs. Warner is going home to live along with me until affairs are settled, and I will make her happy and comfortable." There was also other evidence to show that Marriott had interfered in Mrs. Warner's affairs *and had undertaken to provide her with food and necessaries.* Mrs. Warner accordingly went to live with Marriott and died in his house after a few months. The evidence showed that she was often locked up alone in winter weather in a kitchen without light or fire, that she was excited and cried to get out and that she died from water on the brain. This condition might be the result of exhaustion consequent upon exposure in such a room and the excitement caused by the confinement. The body was, however, very emaciated and showed the want of proper food and nourishment.

Patteson, J. (in summing up) . . . If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but **it will be for you to say, whether, from the way in which the prisoner treated her, he had not by way of contract, in some way or other,** *taken upon him* **the performance of that duty which she from age and infirmity was incapable of doing.** [His Lordship then read the evidence and continued.]

This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased with necessaries; and though if he broke that contract he might not be liable to be indicted during her life, yet if by his negligence her death was occasioned then he becomes criminally responsible.

138.

R. v. INSTAN.

[1893] 1 Q. B. 450 (C. C. R.).

The prisoner, a woman between thirty and forty, with no occupation and no means of her own, lived with her aunt, a woman of seventy-three. The aunt during the last ten days of her life suffered from a disease which rendered her incapable of doing anything for herself. The prisoner took in the food supplied by the tradespeople, but gave no food to her aunt and provided no medical assistance. The aunt died from disease accelerated by want of food, nursing, and medical attendance. *Held*, that the prisoner was properly convicted of manslaughter.

Lord Coleridge, C.J.—It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement. There can be no question in this case that it was the clear duty of the prisoner to impart to the deceased so much as was necessary to sustain life of the food which she from time to time took in, and which was paid for by deceased's own money for the purpose of the maintenance of herself and the prisoner; it was only through the instrumentality of the prisoner that the deceased could get the food. There was, therefore, a common law duty imposed upon the prisoner which she did not discharge. Nor can there be any question that the failure of the prisoner to discharge her legal duty at least accelerated the death of the deceased, if it did not actually cause it. There is no case directly in point; but it would be a slur upon and a discredit to the administration of justice in this country if there were any doubt as to the legal principle or as to the present

case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty. It is unnecessary to say more than that upon the evidence this conviction was most properly arrived at.

133.

R. v. CHATTAWAY.

(1922) 17 Cr. App. 7.

The appellants were convicted of the manslaughter of their daughter. She was twenty-five years of age, and after she had attained full age she had returned to her parents' house, where she had died through neglect and starvation. It was contended that the learned Judge had misdirected the jury, for he had assumed that the deceased was "helpless" within the common law meaning, whereas that was just the fact which it was for the jury to find.

Judgment of the Court of Criminal Appeal, delivered by:—

Lord Hewart, L.C.J.—It cannot be suggested that the learned judge did not assume in his summing-up that the deceased was "helpless," but this omission was more than made up by the overwhelming evidence that she was in fact helpless while in the appellants' "custody, charge or care or control," within the decisions. Thus Blackburn, J., in *R.* v. *Charlotte Smith* (*a*) said: "In order to make him (the master) criminally responsible for neglecting to do so (supplying with food, &c.) it must appear that the master has got the servant so under his own control and dominion *as to be helpless* like a lunatic or infant, and consequently unable to take care of himself. Now, was there in this case sufficient evidence that the deceased stood in such a relation to the prisoner that although there were no bars, locks, or bolts, she was so terrified by the prisoner

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(*a*) *Ante*, p. 233.

that she was in effect so much restrained from withdrawing herself as if she had been so confined? If there had been such evidence, I think that it would support the conviction." In the present case there can be no doubt what the answer of the jury would have been if they had been expressly asked the question whether at the material times the deceased was helpless as an infant under the appellants' control. The Court cannot interfere.

140.

R. v. SENIOR.

[1899] 1 Q. B. 283.

The prisoner was indicted for the manslaughter of his infant child. He belonged to a sect which objected on religious grounds to medical assistance and he had deliberately abstained from providing any. Medical aid would have prolonged and probably saved the child's life. *Held*, that the prisoner had wilfully neglected the child within the meaning of s. 1 of the Prevention of Cruelty to Children Act, 1894, and having thereby caused or accelerated its death he was guilty of manslaughter.

LORD RUSSELL OF KILLOWEN, C.J.—The charge is preferred under s. 1 of the statute to which I have referred (57 & 58 Vict. c. 41) (*a*), the material words of which are as follows: "If any person over the age of sixteen years, who has the custody, charge, or care, of any child under the age of sixteen years, wilfully neglects . . . such child . . . in a manner likely to cause such child unnecessary suffering or injury to its health . . . that person shall be guilty of a misdemeanour."

The portions of the summing-up which it is necessary to refer to are the following: "I told the jury that they must first of all be satisfied that the death of the child had been caused or accelerated by the want of medical assistance; and secondly, that medical aid and medicine were such essential things for the child, that reasonably careful parents in general

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(*a*) Now replaced by s. 12 of the Children Act, 1908.

would have provided them; and thirdly, that the prisoner's means would have enabled him to do so, without an expenditure such as could not be reasonably expected from him." A little further on in the case the learned judge states as follows: **"But I added that if he had done anything which was expressly forbidden by statute, and by so doing had caused or accelerated the child's death, he would be guilty of manslaughter, no matter what his motive or state of mind."** Later on he adds this: "I said there could be no doubt that the prisoner had wilfully and deliberately abstained from calling in medical assistance, though he and those about the child were aware for some considerable period before its death that it was in a state of great danger, and that therefore the question was narrowed down to whether his failure to procure medical aid could be called neglecting the child so as to cause injury to its health. I pointed out that the language was very different from that of the repealed enactment."

The question is whether that direction was substantially right. I think it was. Whether the words in the statute, "wilfully neglects," are taken together, or, as the learned judge did in directing the jury, are taken separately the meaning is very clear. **"Wilfully" means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care—that is the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind**—that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps. I agree with the statement in the summing-up, that the standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidence of neglect in one generation which would not have been thought so in a preceding generation, and that regard must be had to the habits and thoughts of the time. At the present day when medical aid is within the reach of the humblest and poorest members of the community, **it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not**

amount to neglect. Mr. Sutton contended that because the prisoner was proved to be an affectionate parent, and was willing to do all things for the benefit of his child, except the one thing which was necessary in the present case, he ought not to be found guilty of the offence of manslaughter, on the ground that he abstained from providing medical aid for his child in consequence of his peculiar views in the matter; but we cannot shut our eyes to the danger which might arise if we were to accede to that argument, for where is the line to be drawn? In the present case the prisoner is shown to have had an objection to the use of medicine; but other cases might arise, such, for instance, as the case of a child with a broken thigh, where a surgical operation was necessary, which had to be performed with the aid of an anæsthetic; could the father refuse to allow the anæsthetic to be administered? Or take the case of a child that was in danger of suffocation, so that the operation of tracheotomy was necessary in order to save its life, and an anæsthetic was required to be administered.

I think it cannot be doubted that if this case had arisen under the Act of 1868 there would have been ample evidence to warrant a conviction, and in my opinion there is also ample evidence where the case arises under the Act of 1894. I am of opinion that the summing-up of the learned Judge was right and the conviction ought to be affirmed.

141.

OAKEY v. JACKSON.

(1914) 83 L. J. K. B. 712.

An information was preferred against Jackson under s. 12 (1) of the Children Act, 1908, charging that he, being a person over the age of sixteen years, and having the custody, charge or care of Hilda Jackson, a child under the age of sixteen years, did unlawfully and wilfully neglect the said child in a manner likely to cause unnecessary suffering or injury to health. The child was suffering from adenoids and the only remedy was an operation, not dangerous but probably requiring the administration of an anæsthetic. The respondent, who was the father of the child, did not believe in operations nor consider one necessary, and refused to allow the child

to go to the infirmary for the operation. There was no other evidence of neglect. The justices came to the conclusion that the respondent was under no legal liability to allow the operation to be performed, and that he was not guilty of neglect within the Act. The question for the Court was whether the justices came to a correct determination in point of law.

DARLING, J.—The Justices have stated this case in order to remove a difficulty they have in understanding section 12, sub-section 1 of the Children Act, 1908. Under that sub-section a parent who wilfully neglects his child in a manner likely to cause injury to his health is guilty of a misdemeanour, and the sub-section provides that a parent who fails to provide (*inter alia*) adequate medical aid for his child shall be deemed to have neglected him in a manner likely to cause injury to his health. The respondent was charged under this sub-section. His child was suffering from adenoids, which the Justices find were causing mental dulness, impaired breathing, deafness (which is one of the things expressly mentioned in the sub-section as included in the expression injury to health), and anæmia, and the child was accordingly suffering injury to her health which required to be remedied. It is found as a fact that the only possible remedy was a surgical operation, which the respondent, although requested to do so, refused to allow. The Case states that the operation would not be a dangerous one, but would probably require the administration of an anæsthetic. The reference in the sub-section to "injury to or loss of sight" in my opinion shows clearly that it was contemplated that there might be cases in which a parent was bound to allow an operation to be performed on his child. Lord Russell of Killowen considered the meaning of "wilfully . . . neglects" in the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 1—where the words are similar to those in the present Act—in the case of *Reg.* v. *Senior* (*a*): "'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care—that is, the omission of such

(*a*) 68 L. J. Q. B. 175; [1899] 1 Q. B. 283.

steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind—that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps." It is not necessary to know much about surgery to know that the operation for the removal of adenoids is very common in the case of children, and that a failure to perform it may result in danger to the child's life if he should ever happen to be attacked by illness.

We are of opinion that in the present case the Justices did not apply their minds to the proper question. They say that they "came to the conclusion that the respondent was under no legal liability to allow the operation to be performed, and that the refusal to allow such operation to be performed did not constitute neglect to provide adequate medical aid within the meaning of the Act." That begs the question. **The respondent was under a legal obligation if the refusal to allow the operation was in the circumstances a failure to provide adequate medical aid. Whether it is so or not must depend on the facts of each particular case. A refusal to allow an operation is not necessarily such a failure to provide adequate medical aid as to amount to wilful neglect causing injury to health. It is a question of fact in each case, and the nature of the operation and the reasonableness of the parent in refusing to allow it must be considered.** In the present case we think the Justices might very properly have convicted the respondent. But the Case must go back to them for further consideration, and they must consider the question.

AVORY, J.—I am of the same opinion. I only wish to add that the Justices in these cases ought always to consider whether the person who advises the accused as to the necessity of an operation is a qualified medical practitioner or only some irresponsible person.

142.

R. v. HAYWARD.

(1833) 6 C. & P. 159.

A. was requested by his mother to turn B. out of her house, which request he carried out after a struggle. B. said he would make A. remember it and went back to his own lodgings, about 300 yards away, from which he fetched a knife that he used in his business as a butcher. Coming out from his lodgings he met A., who had followed to give him his hat, which had been left behind. A. then asked B. not to come to his mother's house again that night, but B. insisted that he would. After A. and B. had walked a few yards in the direction of the mother's house, A. gave B. his hat, when B. exclaimed that he would have his rights and suddenly stabbed A. in two places with the butcher's knife. One wound was mortal and B. was accordingly indicted for murder.

TINDAL, C.J., told the jury, that if they were satisfied that the death of the deceased had been occasioned by the prisoner having stabbed him with a knife, or some other sharp instrument, of which there could be little doubt, the remaining and principal question for their consideration would be, whether the mortal wound was given by the prisoner while smarting under a **provocation so recent and so strong, that the prisoner might not be considered at the moment the master of his own understanding;** in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only; **or whether there had been time for the blood to cool, and for reason to resume its seat,** before the mortal wound was given, in which case the crime would amount to wilful murder. That, in determining this question, the most favourable circumstance for the prisoner was the shortness of time which elapsed between the original quarrel and the stabbing by the prisoner; but, on the other side, the jury must recollect that the weapon which inflicted the fatal wound was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place. It would be for them to say whether the prisoner had shown thought, contrivance, and design, in the mode of possessing himself of this weapon, and again replacing

it immediately after the blow was struck; for **the exercise of contrivance and design denoted rather the presence of judgment and reason, than of violent and ungovernable passion** (*a*).

143.

R. v. ELLOR.

[1920] 15 Cr. App. 41.

Homicide. Provocation. (The question of law appears from the judgment.)

Judgment of the Court of Criminal Appeal, delivered by THE LORD CHIEF JUSTICE.—The appellant was convicted of murder, and was sentenced to death. He appeals to this Court on the ground of misdirection. It appears that the appellant had some suspicion that his wife was unfaithful to him. On the evidence there is no ground for that suspicion. The appeal is based on the appellant's statement that his wife told him to put his head under a train, and that she was going to enjoy herself that night. The whole basis of the case is that the words used by the appellant's wife meant, or might mean, that she was about to commit adultery. It is contended by counsel for appellant that the words amounted to such provocation as in law would entitle the jury to return a verdict of manslaughter instead of murder.

The question of law is one of some importance. Counsel for the appellant has contended that there are grounds for the proposition that if a wife told her husband that she was going to commit adultery and he then struck her a blow and killed her, it would be open to the jury to reduce the crime from murder to manslaughter. But no authority can be cited in support of such a proposition, and it is not the law of England. A statement by the wife that she was going to live with another man, or that she was about to commit adultery, would not amount to provocation so as to reduce the crime of killing

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(*a*) See also *R.* v. *Kirkham*, *ante*, p. 221.

from murder to manslaughter. The authorities which have been cited support the contrary view. If a man discovers his wife in the act of adultery and kills the adulterer, the law regards the killing in such a case as manslaughter, because it regards the act of adultery as equivalent to a blow struck at the husband, that is to say, in its effect on his self-control. The principle has been extended to meet the case of a sudden confession by a wife that she has committed adultery: *R.* v. *Rothwell* (*a*), but all subsequent cases have treated that case as a special exception to the general rule of law, which is, that words cannot constitute sufficient provocation to justify the jury in reducing the crime from murder to manslaughter, except in very special circumstances. Channell, J., in *R.* v. *Palmer* (*b*), said: "We are of opinion that there was no misdirection . . . . The judge stated the rule in the old form, that words alone can never constitute sufficient provocation to reduce murder to manslaughter. It would, perhaps, have been more accurate in view of modern decisions if he had said that **words cannot constitute sufficient provocation except in very special circumstances. . . . It is well established law that if a husband discovers his wife in the act of adultery and thereupon kills her, he is guilty of manslaughter only and not of murder. That has been extended in** *R.* v. *Rothwell* **and** *R.* v. *Jones*, (*c*), **to a sudden confession by a wife of past adultery, an extension which no doubt creates an exception to the general rule that provocation by words is not enough."** The language used by Blackburn, J., in *R.* v. *Rothwell*, that "a man who discovers his wife in adultery and kills the adulterer is only guilty of manslaughter," was held in *Palmer's Case* to have only a limited application, and in *R.* v. *Birchall* (*d*), and *R.* v. *Greening* (*e*), which came before the Court of Criminal Appeal in the same year as *Palmer's Case*, it was held that the doctrine laid down by Blackburn, J., in *Rothwell's Case* should not be extended (*f*).

(*a*) 12 Cox C. C. 145.
(*b*) [1913] 2 K. B. at p. 29.
(*c*) 72 J. P. 215.
(*d*) 9 Cr. App. R. 291.
(*e*) [1913] 3 K. B. 846.
(*f*) The decisions in (i.) *R.* v. *Palmer*, (ii.) *R.* v. *Greening*, and (iii.) *R.* v. *Birchall* were that the exception does not apply (i.) to a confession of illicit intercourse by a woman to whom the prisoner was engaged, (ii.) to

Therefore, on the authorities which were cited, there is nothing to support the proposition which has been submitted, but, on the contrary, the reported decisions are against the wide extension of the doctrine contended for in this case.

144.

R. v. LESBINI.

[1914] 3 K. B. 1116.

The prisoner was convicted of murder. He had received some slight provocation, but not sufficient to deprive a reasonable man of self-control. On his behalf, it was argued that he was afflicted with defective mental balance and want of self-control.

Judgment of the Court of Criminal Appeal, delivered by Lord Reading, C.J.—It is now said before us that we as a Court of Appeal might come to the conclusion that the tests laid down in the well-known authorities as to the provocation necessary to constitute a defence of manslaughter are too narrow and that we could extend it, and if we come to the conclusion that it ought to be extended, we could enter a verdict of manslaughter and alter the sentence. It is sufficient to say that we see no reason to dissent from what was said by Darling, J., in giving judgment in *R.* v. *Alexander* (*a*). A similar argument was placed before the Court in that case. It substantially amounts to this, that the Court ought to take into account different degrees of mental ability in the prisoners who come before it, and if one man's mental ability is less than another's it ought to be taken as a sufficient defence if the provocation given to that person in fact causes him to lose his self-control, although it would not otherwise be a sufficient defence because it would not be provocation which ought to affect the mind of a reasonable man. We

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a similar confession by a woman living with the prisoner as his wife, (iii.) to mere suspicion of a wife's adultery.

(*a*) 9 Cr. App. R. 139.

agree with the judgment of Darling, J., in *R.* v. *Alexander*, and with the principles enunciated in *R.* v. *Welsh*, where it is said that "**there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion.**" We see no reason, therefore, to dissent in any way from the principle of law on which this case was tried. On the contrary we think it is perfectly right.

Note.—The instrument with which the homicide was effected must also be taken into account: if it is effected with a deadly weapon the provocation must be very great to reduce the offence to manslaughter; but if the weapon is not likely to cause death, a lesser provocation may suffice. See "Archbold's Criminal Pleading and Practice, p. 846, and *R.* v. *Lynch*, 5 C. & P. 324. **"It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter"** (Lord Tenterden).

145.

STEPHENS v. MYERS.

(1830) 4 C. & P. 349.

The plaintiff was acting as chairman at a meeting and sat at a table at which the defendant also sat, there being six or seven persons between them. The defendant being disorderly a motion was carried that he should be turned out. The defendant threatened to pull the plaintiff out of his chair and was advancing with his fists clenched and apparently with the intention of carrying out his purpose, when he was stopped by another person. At the time when he was stopped he was not near enough to reach the plaintiff by a blow with his fist. *Held*, that it was an assault in point of law.

TINDAL, C.J. (in summing up).—**It is not every threat, when there is no actual personal violence, that constitutes an assault: there must, in all cases, be the means of carrying the threat into effect.** The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow

would almost immediately have reached the chairman, if he had not been stopped; then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff and give him such damages as you think the nature of the case requires.

146.

R. v. DAY.

(1841) 9 C. & P. 722.

The prisoner was charged upon an indictment containing a count for a common assault on a girl of ten years of age. The child offered no resistance, but submitted quietly. *Held*, that mere *submission* due to fear is not equivalent to voluntary *consent* so as to amount to a defence.

Coleridge, J.—It has been contended by the learned counsel on behalf of the prisoner, that this case, being now reduced to a charge of common assault only, consent or non-consent on the part of the prosecutrix becomes material; and so indeed it does; but then we must look at the nature of the circumstances from which consent is to be inferred. **There is a difference between consent and submission;** every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description was not consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will therefore say whether the submission of the prosecutrix was voluntary on her part, or the result of fear under

the circumstances in which she was placed. If you are of the latter opinion, you will find the prisoner guilty on the second count of the indictment.

147.

SEWELL v. THE NATIONAL TELEPHONE CO., LIM.

[1907] 1 K. B. 557.

A. was arrested by police constables and taken to a police station and charged with stealing a piece of metal the property of B. He was detained in custody till the following morning, when he was brought before a magistrate and committed to quarter sessions, where he was acquitted. While A. was at the police station B. was communicated with and his manager went to the police station and signed the charge sheet. *Held*, that the mere signing of a charge sheet was not evidence of anything directly causing the imprisonment of A.

COLLINS, M.R.—The distinction between actions for false imprisonment and actions for malicious prosecution is well settled, and cannot be put better than in the words of Willes, J., in his judgment on the case of *Austin* v. *Dowling* (*a*). The learned Judge said: "**The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment.** There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer. It is fallacious to inquire whether or not the one is severable from the other, until you find some inseparable connection between

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(*a*) L. R. 5 C. P. at p. 540.

them. It may very well happen in the superior Courts, which have jurisdiction over both descriptions of action, where the plaintiff, having been at once taken before a magistrate, may be content to bring his action for false imprisonment only. In such a case—which must be within the memory of all of us—the Judge would tell the jury to give damages for the false imprisonment only, and not for what came under the cognizance of the magistrate." Bearing that distinction in mind, this case falls on the side of the line on which no action for false imprisonment will lie. **If a person desires to obtain a judicial decision from a proper tribunal, and for that purpose states the facts to a police officer, and the latter, acting on his own initiative, arrests the person implicated, no trespass is committed by the person who gives information to the police officer.**

148.

R. v. PEMBLITON.

(1874) L. R. 2 C. C. R. 121.

The prisoner was convicted under s. 51 of the Malicious Damage Act, 1861, of "unlawfully and maliciously" committing damage. He had thrown a stone at some persons with whom he had been fighting in the street and missing them had broken a window. The jury found that he threw the stone intending to strike some person and not intending to strike the window. *Held*, that as the finding of the jury negatived the existence of malice the conviction must be quashed.

Lord Coleridge, C.J.—The facts of the case are that there was fighting going on in the streets of Wolverhampton near the prosecutor's house, and the prisoner, after fighting some time, separated himself from the crowd and threw a stone, which missed the person he aimed at, but struck and broke a window, doing damage to the extent of upwards of £5. The question is, whether under an indictment for unlawfully and maliciously injuring the property of the owner of the plate-glass window, these facts will support the indictment when coupled with the other facts found by the jury, that the prisoner threw the stone

at the people intending to strike one or more of them, but not intending to break a window. I am of opinion that the evidence does not support the conviction. The indictment is under the 24 & 25 Vict. c. 97, s. 51, which deals with malicious injuries to property, and the section expressly says that the act is to be unlawful and malicious. There is also the 58th section, which makes it immaterial whether the offence has been committed from malice against the owner of the property or otherwise, that is, from malice against someone not the owner of the property. In both these sections it seems to me that **what is intended by the statute is a wilful doing of an intentional act.** Without saying that if the case had been left to them in a different way the conviction could not have been supported, if on these facts the jury had come to a conclusion that the prisoner was reckless of the consequence of his act, and might reasonably have expected that it would result in breaking the window, it is sufficient to say that **the jury have expressly found the contrary.** I do not say anything to throw doubt on the rule under the common law in cases of murder which has been referred to, but the principles laid down in such case have no application to the statutable offence we have to consider.

Blackburn, J.—I am of the same opinion. We have not now to consider what would be malice aforethought to bring a given case within the common law definition of murder; here the statute says that the act must be unlawful and malicious, and malice may be defined to be "where any person wilfully does an act injurious to another without lawful excuse." **Can this man be considered, on the case submitted to us, as having wilfully broken a pane of glass? The jury might perhaps have found on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequences of his act would be to break the glass, and although that was not his wish, yet that he was reckless whether he did it or not; but the jury have not so found, and I think it is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do.**

149.

R. v. MARTIN.

(1882) 8 Q. B. D. 54 (C. C. R.).

At the end of a performance in a theatre the prisoner, with the intent of frightening persons leaving the gallery, put out the lights on the staircase and placed a bar across a door through which they had to go. In consequence of the panic thus caused there was a struggle on the staircase in which several persons were injured. *Held*, that the prisoner was guilty of unlawfully and maliciously inflicting bodily harm upon the persons injured.

Lord Coleridge, C.J.—I am unable to entertain any doubt as to the propriety of this conviction. The prisoner was indicted under 24 & 25 Vict. c. 100, s. 20, which enacts that "whosoever shall unlawfully and maliciously wound, or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, etc." The learned Judge after stating the facts continued: Upon these facts the prisoner was convicted, and the jury found all that was necessary to sustain the conviction. **The prisoner must be taken to have intended the natural consequences of that which he did. He acted "unlawfully and maliciously," not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured.** Just as in the case of a man who unlawfully fires a gun among a crowd, it is murder if one of the crowd is thereby killed. The prisoner was most properly convicted.

Stephen, J.—I am entirely of the same opinion, but I wish to add that the Recorder seems to have put the case too favourably for the prisoner, for he put it to the jury to consider whether the prisoner did the act "as a mere piece of foolish mischief." **Now it seems to me that if the prisoner did that which he did as a mere piece of foolish mischief unlawfully and without excuse he did it "wilfully," that is "maliciously" within the meaning of the statute.** I think it important to notice this, as the word "malicious" is capable

of being misunderstood. Lord Blackburn in the cases of *R.* v. *Ward* (*a*) and *R.* v. *Pembliton* (*b*) lays it down that **a man acts "maliciously" when he wilfully and without lawful excuse does that which he knows will injure another.**

150.

R. v. LATIMER.

(1886) 17 Q. B. D. 359 (C. C. R.).

The prisoner was convicted under s. 20 of the Offences against the Person Act, 1861, of "unlawfully and maliciously wounding" a woman named Rolston. He had quarrelled in a public-house with a man named Chapple, at whom he had aimed a blow with his belt. The belt had however glanced off Chapple and severely wounded the woman Rolston, who was sitting by his side. *Held*, that the prisoner was rightly convicted.

Coleridge, C.J.—We are of opinion that this conviction must be sustained. It is common knowledge that **a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the Judges call general malice, and that is enough.** Such would be the case if the matter were *res integra*; but it is not so, for *R.* v. *Hunt* (*c*) is an express authority on the point. There a man intended to injure A., and said so, and in the course of doing it stabbed the wrong man, and had clearly malice in fact, but no intention of injuring the man who was stabbed. He intended to do an unlawful act, and in course of doing it the consequence was that somebody was injured. But the words of the statute under which the prisoner is indicted carry the case against him further still, because 24 & 25 Vict. c. 100, s. 18, enacts that "whosoever shall unlawfully and maliciously cause any grievous bodily

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(*a*) L. R. 1 C. C. R. 356.
(*b*) L. R. 2 C. C. R. 122.
(*c*) 1 Moo. C. C. 93.

harm to any person " with malicious intent shall be guilty of felony; then s. 20 leaves out the intent and says, " whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person . . . shall be guilty of a misdemeanour." The language of s. 18 and of s. 20 is different and the present conviction is under s. 20 and not under s. 18.

The Master of the Rolls has pointed out to me that these sections are in substitution for and in correction of the earlier statutes, in which the unlawful act must be done with intent to injure " such person," making it necessary that the intent should be against the person injured, whereas in 24 & 25 Vict. c. 100 the words " such person " are left out, for s. 18 says " any person " and s. 20 " any other person." So but for *R.* v. *Pembliton* (*b*) there would not have been the slightest difficulty. Does that case make any difference? I think not, and, on consideration, that it was rightly decided. But it is clearly distinguishable, because the indictment in *R.* v. *Pembliton* was on the Act making unlawful and malicious injury to property a statutory offence punishable in a certain way, and the jury expressly negatived, and the facts expressly negatived, any intention to do injury to *property*, and the Court held that under the Act making it an offence to injure any property there must be an intent to injure *property*. *R.* v. *Pembliton* therefore does not govern the present case, and on no other ground is there anything to be said for the prisoner.

BOWEN, L.J.—I am of the same opinion. It is quite clear that the act was done by the prisoner with malice in his mind. I use the word " malice " in the common law sense of the term, viz., **a person is deemed malicious when he does an act which he knows will injure either the person or property of another.** The only case that could be cited for the prisoner is *R.* v. *Pembliton*, which was founded—not upon malice in general—but upon *a particular form of malice*, viz., malicious injury to property; and the Court held that though the prisoner might have been acting maliciously in the common law sense

(*b*) L. R. 2 C. C. R. 119.

of the term, he was not malicious in the sense of the Act directed against malicious injury to property. That decision does not apply to a case under the Act where the indictment is for injury to the person. *R.* v. *Pembliton* might have been ground for an argument of some plausibility if the prisoner meant to strike at a pane of glass and had hit a person. It might have been that the malice in that case was not enough. But when, as here, an intent to injure a person is proved, that is enough.

Lord Esher, M.R.—I am of the same opinion. The only case which could be cited against the well-known principle of law applicable to this case was *R.* v. *Pembliton*, but on examination it is found to have been decided on this ground, viz., that there was no intention to injure any property at all. It was not a case of attempting to injure one man's property and injuring another's, which would have been wholly different.

151.

R. v. CHILD.

(1871) L. R. 1 C. C. R. 307.

By s. 7 of the Malicious Damage Act, 1861, it is a felony unlawfully and maliciously to set fire to any goods in a building "under such circumstances that if the building were thereby set fire to the offence would amount to felony." The prisoner from ill-will against the prosecutrix broke up her furniture in the kitchen of her lodgings and set fire to it. The house would have ignited had not the fire been put out very soon. The jury found that the prisoner was guilty, but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious. *Held*, that the prisoner could not be convicted of felony under s. 7.

Bovill, C.J.—The question reserved in this case is as to the construction of 24 & 25 Vict. c. 97, s. 7, which enacts that "whosoever shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, under such circumstances that, if the building were thereby set fire to, the offence would amount to felony, shall be guilty of felony." The indictment was framed in the terms of this

section. The evidence was that the prisoner, from ill-will and malice against the owner of goods in a house, set fire to those goods under such circumstances that the house would almost certainly have been burned if the fire had not been extinguished. But, in fact, the house was not set on fire. Upon these facts the learned Judge left it to the jury to say whether, if the house had caught fire, the setting fire to it would have been malicious and with intent to injure. And he told them that if they thought the prisoner was aware that what he was doing would probably set the building on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that if the house had caught fire the offence would have been felony. The jury found the prisoner guilty, but not so that if the house had caught fire the setting fire to it would have been wilful and malicious. By that finding I think they negatived the whole of what the learned Judge left to them, and found, in effect, that the prisoner was not aware that what he was doing would probably set fire to the house, and so injure the owner, and was not reckless whether it did so or not. **The only finding of the jury,** therefore, **is that the goods were set on fire with intent to injure the owner of the goods.** Now, there is no section in the Act which makes the wilful and malicious setting fire to goods felony. The only section which could be applicable to the case is s. 7; and if we were to hold the case to be within that section we should be rejecting the words "under such circumstances that if the building were thereby set fire to the offence would amount to felony." I think that, to come within those words, the facts must have some relation to the house; and that they point to circumstances under which, if the house caught fire, the offence would fall within some of the earlier sections of the Act. But the case does not fall within any of them. **It is a simple case of wilfully and maliciously setting fire to goods, and no more felony than setting fire to a box of matches on a stone floor.**

BLACKBURN, J.—I am of the same opinion. I reserved the question for this Court because I thought the framers of the section in question intended to include this case. But they

have failed to express their intention. The earlier enactment (14 & 15 Vict. c. 19, s. 8) made it felony wilfully and maliciously to set fire to goods "being in any building the setting fire to which is made felony, etc." And under those words the prisoner might have been convicted of felony under both counts. But the consolidating Act uses different words. It speaks of setting fire to goods in a building "under such circumstances that if the building were thereby set fire to, the offence would amount to felony." It appears from W. Greaves' note, in his edition of the Consolidation Acts (p. 165), that this change of language was deliberate. His opinion is, that if you set fire to one thing under such circumstances that you are likely thereby to set fire to another thing, then if the setting fire to the one is malicious the setting fire to the other is too . . . if that is good law, then the setting fire to the house here, if it had caught fire, would have been felony. But it is not law, and the framers of the Act have failed to express the meaning that they intended to express.

152.

R. v. LYNCH.

[1903] 1 K. B. 444.

L., a British subject, obtained letters of naturalisation in the South African Republic after the commencement of the South African War. *Held*, that this was in itself an act of treason and no defence to an indictment for treason in subsequently joining the military forces of the enemy.

Lord Alverstone, C.J.—We have none of us any doubt whatever upon this point; but, having regard to the nature of the proceedings and their serious character, we thought it better that the matter should be fully argued before we expressed our opinion. The indictment charges the prisoner in two counts with adhering to the Government of the South African Republic, and in the others with adhering to the Government of the Orange Free State, and it alleges altogether

some fifteen overt acts; but for the purposes of the argument that has been addressed to us it is important to draw a distinction between the two first overt acts and the subsequent overt acts. The two first acts, the declaration of willingness to take up arms and the taking of oath of allegiance to the South African Republic, although they took place on the same day as the grant of letters of naturalisation, in fact preceded it. The other overt acts were all deliberate acts of warfare or in aid of warfare against the forces of the Crown, and took place subsequently to the grant of naturalisation. It is not disputed on behalf of the prisoner that, apart from the Naturalisation Act, 1870, the alleged naturalisation in the enemy State would afford no defence. But reliance is placed on s. 6, which provides that "any British subject who has at any time before or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalised in such State, shall from and after the time of his so having become naturalised in such foreign State, be deemed to have ceased to be a British subject, and be regarded as an alien." It is contended that this provision entitles a British subject to become an alien and throw off his allegiance to the Crown even in time of war. Even if that were so, it would afford no defence in respect to the first two overt acts, for by s. 15, "Where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien." And it cannot be seriously contended that the two first acts which formed the basis of the naturalisation, and without which naturalisation could not under the circumstances have been obtained at all, were not "done before the date of his so becoming an alien" within the meaning of s. 15. But, further, I am clearly of opinion that s. 6 does not empower a British subject to become naturalised in an enemy country during time of war, and that consequently the question of the prisoner's liability with respect to the subsequent overt acts must also be left to the jury. In my opinion there is nothing in the Act of 1870 to justify the contention that an act of treason can give any rights to any person

whatever. If it was the intention of the Legislature to produce so strange a result, that intention must be found expressed in clear and explicit language, and not be inferred from general language designed to serve another and useful purpose. Whatever a declaration of war may or may not do, it at any rate prevents British subjects from making arrangements with the King's enemies, when such arrangements would constitute crimes against the law of the country to which they owe allegiance.

153.

R. v. CASEMENT.

[1917] 1 K. B. 98.

By the Treason Act, 1351, it is treason "if a man . . . be adherent to the King's enemies in his realm, giving to them aid or comfort in his realm or elsewhere, and thereof be probably attainted of open deed." During the war between the United Kingdom and Germany, a British subject went to Germany and there endeavoured to persuade other British subjects, who were prisoners in Germany, to join the German forces. He also took part in an expedition from Germany with the object of landing arms in Ireland for the use of the German forces. *Held*, that he was guilty of treason and that he could be tried in this country.

At the trial, in the King's Bench Division, the Lord Chief Justice, in summing up, directed the jury as follows.—**If a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort to the King's enemies. Again, if a British subject commits an act which weakens or tends to weaken the power of the King and of the country to resist or to attack the enemies of the King and the country, that is in law the giving of aid and comfort to the King's enemies.**

It was contended by Serjeant Sullivan for the prisoner that the giving of aid and comfort outside the realm did not constitute an offence which could be tried in this country, unless

the person who gave the aid and comfort was himself within the realm when he gave it. This argument was founded on the difficulties arising out of the doctrine of "venue," the rule of common law being that only a jury of the district in which the offence was committed could convict of it, so that no offence committed outside the body of a county was cognizable at common law.

This contention was dealt with as follows by the Court of Criminal Appeal:—

But there is a large amount of authority for the proposition that what the jury have found was done by this appellant, and what it is not contested was done . . . is an offence triable . . . in the King's Bench. Taking the words of the statute themselves, it appears to us that the construction for which Serjeant Sullivan contends is not the true one. He would have it that "be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," means that the adherence, because it is the adherence which is the offence, must be by a person who, *being in this country*, gives the aid and comfort, it may be in this country, it may be outside of it. **We agree that if a person, being within this country, gives aid and comfort to the King's enemies in this country he is adherent to the King's enemies: we agree . . . that if he is in this country and he gives aid and comfort to the King's enemies outside this country he is adherent to the King's enemies. But we think there is another offence, and that these words must mean something more than that. We think that the meaning of these words is this: "giving aid and comfort to the King's enemies" are words in apposition; they are words to explain what is meant by being adherent to, and we think that if a man be adherent to the King's enemies in his realm by giving to them aid and comfort in his realm, or if he be adherent to the King's enemies elsewhere, that is by giving them aid or comfort elsewhere, he is equally adherent to the King's enemies, and if he is adherent to the King's enemies, then he commits the treason which the statute of Edward III. defines.** Reasons may be given for that, but we think a very good reason is to

be found in this, that the subjects of the King owe him allegiance, and the allegiance follows the person of the subject. He is the King's liege wherever he may be and he may violate his allegiance in a foreign country just as well as he may violate it in this country. If authority were wanted for that it is to be found in *R.* v. *Cundell* (*a*). . . .

A statute was passed which has often been cited here, a statute of 35 Hen. 8, and what it says is this "An Act concerning the trial of treasons committed out of the King's Majesty's dominions." There is a distinct statement that you can commit treason out of the King's dominions; it is only a question of how the person is to be tried, and it says [Darling, J., who delivered the judgment of the Court of Criminal Appeal, here read the section of the statute, which (paraphrased) provides that all manner of offences already made or declared, or hereafter made or declared, to be treasons, and committed, or hereafter to be committed, by any person out of the realm of England, shall be enquired of, heard, and determined before the King's Bench. He then continued:] Therefore this trial was rightly had in the King's Bench, provided what was done by the appellant amounted to treason by virtue of the statute of Edward III. . . . Now this statute has been understood long before to-day, has been understood by lawyers of great learning and lawyers of very exceptional erudition in the sense in which we have to-day said we understand it. . . . And if we were to accede to the argument of Serjeant Sullivan we should have absolutely to disregard the opinion of Lord Coke, the opinion of Mr. Serjeant Hawkins, and the opinion of Sir Matthew Hale, all great names in the law, and persons whose opinions have long been followed on many questions of extreme difficulty which have puzzled lawyers for many generations.

(*a*) 4 Newgate Calendar 62.

154.

R. v. AHLERS.

[1915] 1 K. B. 616.

The appellant was a German-born subject who had become naturalized in 1905. On August 4, 1914, he was acting as German consul at Sunderland, and on August 5, 1914, he assisted two German subjects of military age with money and information in order to enable them to return from England to Germany. He was convicted on an indictment for high treason, which charged him with adhering to and aiding the King's enemies. His defence was that he did not know that war between England and Germany had commenced on August 5, and further, or alternatively, that he believed that by the modern practice of nations German subjects would have a reasonable time in which to return home from England and that what he did was done in the exercise of his duty as German consul and not for the purpose of injuring this country. *Held*, that as this alternative defence was not put to the jury, the conviction must be quashed.

Judgment of the Court of Criminal Appeal, delivered by:

Lord Reading, C.J.—It was further contended that the jury ought to have been told to consider not merely the bare acts of the prisoner, but his intention and purpose in doing them. **It cannot be doubted that his intention and purpose in doing the acts were material to the issue which was then before the jury.** Unless the jury were satisfied that his intention and purpose in acting as he did were evil . . . and that he was intending to aid and comfort the King's enemies and did these acts with that object, they could not find him guilty of the act charged. He was charged in the words of the indictment with "contriving and . . . intending to aid and assist the enemies of our Lord the King against our said Lord the King and his subjects heretofore during the said war . . . and with force of arms unlawfully maliciously and traitorously . . . adhering to aiding and comforting the German Emperor against our Lord the King." The defence put forward on his behalf at the trial was that, acting in his capacity of a consul, and with the belief that he had, his object was to assist German subjects to return to their own country, and that his intention was not in any way to injure this country's interests, but

merely to carry out his duty and help these German subjects to return to their own country. . . . It is not for this Court to pronounce an opinion as to which of these two views was correct. . . . The learned Judge . . . did not put to the jury the [above] alternative views as to his purpose and intention to which we have called attention. . . . We cannot . . . find that the jury ever had it brought to their notice that it was possible, if they chose to adopt the view that the prisoner was not actuated by the intention and had not the purpose of aiding and comforting the King's enemies. . . . As this Court has often ruled, it is not enough to support the conviction that the jury *might* have come to the same conclusion, had the proper direction been given. Before we can uphold a verdict of guilty after misdirection, we must be satisfied that, had the proper direction been given, the jury *must* have come to the same conclusion and convicted the prisoner. We cannot do so in this case.

155.

R. v. BAKER.

[1895] 1 Q. B. 797 (C. C. R.).

A. was charged with selling beer without a licence. Being sworn he deposed that he had never authorized his solicitor to plead guilty to a previous charge of the same nature and that he had no knowledge that his solicitor intended to plead guilty on his behalf on the previous occasion. In fact A. had authorized his solicitor to plead guilty to the earlier charge and had expressed his satisfaction with the result. *Held*, that, as A.'s statements affected his credit as a witness at the hearing of the second charge, they were material and therefore he was guilty of perjury.

Lord Russell of Killowen, C.J.—The sole point for our consideration in this case is whether the statements made by the defendant, which the jury have found to have been made falsely and wilfully, were material to the case which was before the stipendiary magistrate when the defendant was charged for the second time with the offence of selling beer without a

licence. I will take the grounds relied on for the defendant in the order in which they are stated in the case. The first ground taken is that as the defendant had admitted his previous conviction, and had not appealed therefrom, it was immaterial to the then pending inquiry whether the previous plea of guilty had been put in by the defendant's consent or not. The answer to that contention is that the defendant's answers would affect his credit as a witness, and **all false statements, wilfully and corruptly made as to matters which affect his credit, are material.** The magistrate may be influenced, in arriving at his decision, by the circumstances of the previous conviction, and, if the defendant's solicitor had pleaded guilty on his behalf without his knowledge or consent, that circumstance might have been taken into consideration as affecting the amount of punishment. The second ground taken is that the previous conviction could only become material when the magistrate decided to convict in the then pending proceeding, and that, as a fact, the proceedings had been adjourned to await the result of the prosecution for perjury. I do not see the relevance of that argument. The magistrate must consider the case on the evidence given before him, and the circumstances may have an influence on the punishment. If on the previous occasion the defendant had, as he alleged, been convicted *per incuriam*, the magistrate might have given him the benefit of that fact, and might have treated the subsequent charge as if it had been a charge of a first offence. The third ground taken is that a previous conviction only affected the amount of punishment to be awarded by a magistrate, and not any issue to be determined by him, and further that the magistrate could only take cognizance of the fact of the previous conviction, and not of the circumstances under which it took place. But as I have already pointed out in dealing with the previous objections, it is wrong to suggest that the magistrate could only take cognizance of the fact of the previous conviction. For these reasons I am of opinion that the words stated in the case were material. I will deal shortly with the authorities. In *R.* v. *Overton* (*a*) the date of a

(*a*) C. & M. 655.

receipt which had been given for the price of a greyhound was held to be material. Patteson, J., so held, after consulting Parke, B., on the ground that **every question on cross-examination of a witness which goes to his credit is material.** The case afterwards came before a Court consisting of eleven judges, who supported the view adopted by Parke, B., and Patteson, J. In *R.* v. *Lavey* (*b*), where a plaintiff in a county court had falsely sworn that she had never been tried at the Old Bailey, and had never been in custody at the Thames Police Station, the evidence was held to be material. This, again, was on the ground that it affected her credit. In *R.* v. *Gibbon* (*c*) it was held by eleven judges, Martin, B., and Crompton, J., doubting, that perjury might be assigned on evidence going to the credit of a material witness in a cause although such evidence, being legally inadmissible, ought not to have been received. That is a very strong authority—much stronger than is needed to support the conviction in the present case. I am of opinion that the evidence was material, and the conviction was right and ought to be affirmed.

Note.—By s. 1 (1) of the Perjury Act, 1911, "If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury." By s. 1 (6) the question whether a statement is material is a question of law to be determined by the Court of trial. In *R.* v. *Wheeler* [1917] 1 K. B. 283, the appellant, having pleaded guilty, was sworn as a witness and wilfully made a false statement in the hopes of influencing the Court to mitigate his sentence. He was indicted for perjury and convicted. *Held*, by the Court of Criminal Appeal, that the statement was material and that the conviction was right.

(*b*) 3 C. & K. 26.
(*c*) L. & C. 109.

156.

R. v. WARBURTON.

(1871) L. R. 1 C. C. R. 276.

W. and L. were in partnership. W. for the purpose of defrauding L. entered into an agreement with P. to make it appear that P. was a creditor of the firm so that certain partnership property might be handed over to P. and divided between W. and P. The offence was complete before the Larceny Act, 1868, by which a partner can be criminally convicted for feloniously stealing partnership property. *Held*, that such a fraudulent agreement was a conspiracy.

COCKBURN, C.J.—It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. **It is not necessary to constitute a conspiracy that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful,** *i.e.*, **amount to a civil wrong.** Here there was undoubtedly an agreement with reference to the division of the partnership property or of the partnership profits. It is equally clear that the agreement was to commit a civil wrong, because the agreement was to deprive the prisoner's partner by fraud and false pretences of his just share of the property or profits of the partnership. A civil wrong was thus intended to (him). The facts of this case thus fall within the rule that, **when two fraudulently combine, the agreement may be criminal although if the agreement were carried out no crime would be committed, but a civil wrong only would be inflicted on a third party.** In this case the object of the agreement was, perhaps, not criminal. It is not necessary to decide whether or not it was criminal; it was, however, a conspiracy, as the object was to commit a civil wrong by fraud and false pretences, and I think that the conviction should be affirmed.

157.

R. v. BURGESS.

(1886) 16 Q. B. D. 121.

Burgess was employed to levy a distress on the goods of Bedford. Bagley while in possession as the assistant of Burgess stole 28s. from a drawer in the house. Burgess was informed by Bedford and on April 3 gave information to the police. On June 11 Burgess saw Bedford's mother and gave her the following document: "I, W. H. Burgess, undertake not to charge A. Bagley with any criminal case that I have now against him on the money being provided to pay what he took from Peckham Road while in possession, viz., 30s., W. H. Burgess." On July 5, Bagley's stepfather paid Burgess £1 and gave him an IOU for 5s. on which Burgess wrote a receipt at the foot of the original document, "Received the sum of 30s. as stated above." Burgess then told Bagley he was a free man and that things were all right as he had paid the money. *Held*, that Burgess was guilty of compounding a felony.

Lord Coleridge, C.J.—This case raises two questions, the first being whether this indictment is bad on the face of it, and the second being whether there was any evidence upon the indictment as framed to go to the jury. With regard to the first question, it is admitted that the indictment sufficiently alleged the offence, if the offence is complete without the allegation that the defendant abstained from prosecuting. It is suggested that the indictment is bad because it does not allege that the defendant did abstain from prosecuting. The difficulties in the way of that contention are to my mind enormous. One question which at once arises is when on that view can the offence be said to be complete? A man might conceivably make an illegal agreement not to prosecute and abstain from prosecuting for six years and then might turn round and prosecute after all in breach of the agreement. According to the contention he could not be guilty of the offence because he did ultimately prosecute, and if so it is difficult to see when such an offence can be said to be complete. The way in which one of my learned Brothers put the contention seems to me to be a *reductio ad absurdum* of the argument. It being admitted that such an agreement is unlawful in the sense that it is not enforceable at law, it is said

that, if the maker of it keeps his agreement, he is guilty of an offence, but if, in addition to making such an illegal agreement, he is guilty of the further fraud towards the other party of breaking it, he is guilty of no offence at all. Thus stated the proposition seems to me to be contrary to good sense, and to be a sufficient answer to itself. Then it is said that the offence alleged is the old offence of theft-bote and that no one can be guilty of that offence except the owner of the goods. I do not deny that by some writers, especially by Lord Coke, expressions have been used which may be read so as to afford some countenance to this contention. It seems to me, however, that when the writers in question so expressed themselves, it was probably because the question whether the offence could be committed by persons other than the owner of the goods was not then present to their minds and they were dealing with what would be the case on ninety-nine out of a hundred occasions, viz., the case where the person who was gulity of interfering with the course of justice for his own benefit was the owner of the goods. One can easily see, I think, how it has happened in this way that language has been used which seems to favour to some extent the contention for the defendant, but it must be observed that the writers of the passages to which I refer do not use any negative expression to the effect that the offence can only be committed by the owner of the goods. But, on the other hand, there are not wanting in some of the other authorities indications of the contrary view. The language used by Blackstone in his Commentaries concerning theft-bote seems to me to show that he can hardly have considered the offence as capable of being committed only by the owner of the goods. I admit that he does not say expressly that it can be committed by another person. But neither, on the other hand, do the writers who have been cited expressly say that it cannot. He says of theft-bote "this is frequently called compounding a felony, and formerly was held to make a man an accessory but is now punished only with fine and imprisonment. This perversion of justice in the Old Gothic constitutions was liable to the most severe and infamous punishment, and the Salic law

lationi eum similem habuit qui furtum celare vellet et occulte sine judice compositionem ejus admittere." This latter portion of what he says on the subject clearly seems inconsistent with the notion that he thought the offence of compounding the felony could only be committed by the owner of the goods, for it seems to imply that the definition as given by the Salic law was a good definition of the offence of compounding a felony, and that anyone was guilty of the offence, "*qui furtum celare vellet et occulte sine judice compositionem ejus admittere.*" These expressions seem to me to indicate that there was present to his mind the possibility of the offence being committed by a person other than the owner of the goods. I am of opinion that the defendant upon the facts stated was guilty of the offence of compounding a felony and that therefore the conviction must be affirmed.

158.

BEATTY v. GILLBANKS.

(1882) 9 Q. B. D. 308.

Beatty was a leader of the Salvation Army at Weston-super-Mare and was accustomed to organize Sunday processions through the streets of that town. A rival organization, calling itself the Skeleton Army, was hostile to the Salvation Army and formed processions with the object of preventing the passage of the Salvation Army. Large mobs accompanied and encouraged both the rival processions so that when they came into collision serious riots ensued. In consequence of this state of affairs a notice was issued and signed by two justices of the peace forbidding all persons from assembling to the disturbance of the public peace. The next Sunday after the issue of this notice a police sergeant stopped the procession of the Salvation Army and told Beatty that he must desist from leading it and disperse at once or he would be arrested. Beatty however refused to comply and marched on, when he was arrested. His place as leader was then taken by Mullins and Bowden, who were thereupon also arrested. Neither of these three persons was guilty of any act of violence and all submitted quietly to arrest. They were charged at Petty Sessions for unlawfully and tumultuously assembling with others to the disturbance of the public peace and against the peace

of the Queen, and were convicted and fined. *Held*, that they were not rightly convicted.

FIELD, J.—I am of opinion that this order cannot be supported. The matter arises in this way. The appellants have, with others, formed themselves into an association for religious exercises among themselves, and for a religious revival, if I may use that word, which they desire to further among certain classes of the community. No one imputes to this association any other object, and so far from wishing to carry out with violence, their opinions seemed to be opposed to such a course, and, at all events in the present case, they made no opposition to the authorities. That being their lawful object, they assembled as they had done before and marched in procession through the streets of Weston-super-Mare. No one can say that such assembly is in itself an unlawful one. The appellants complain that in consequence of this assembly they have been found guilty of a crime of which there is no reasonable evidence that they have been guilty. The charge against them is that they unlawfully and tumultuously assembled, with others, to the disturbance of the public peace and against the peace of the Queen. Before they can be convicted it must be shown that this offence has been committed. There is no doubt that they and with them others assembled together in great numbers, but such an assembly to be unlawful must be tumultuous and against the peace. As far as these appellants are concerned there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said, that the conduct pursued by them on this occasion was such as, on several previous occasions, had produced riots and disturbance of the peace and terror to the inhabitants, and that the appellants knowing when they assembled together that such consequences would again arise are liable to this charge.

Now I entirely concede that everyone must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable and the justices would have been right in binding them

over. But the evidence set forth in the case does not support this contention; on the contrary, it shows that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them.

In Hawkins' "Pleas of the Crown," it is said: "An unlawful assembly according to the common opinion is a disturbance of the peace by persons barely assembling together with the intention to do a thing which if it were executed would make them rioters, but neither actually executing it nor making a motion toward the execution of it." On this definition, standing alone, it is clear that the appellants were guilty of no offence, for it cannot be contended that they had any intention to commit any riotous act. The paragraph however continues thus: "But this seems to be much too narrow a definition. For any meeting whatever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly, as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no man can foresee what may be the event of such assembly." Examples are then given, but in each the circumstances of terror exist in the assembly itself, either in its object or mode of carrying it out, and there is the widest difference between such cases and the present. **What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together,** and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition and the question of the justices whether the facts stated in the case constituted the offence charged in the information must therefore be answered in the negative.

159.

WISE v. DUNNING.

(1901) 71 L. J. K. B. 165.

The appellant had conducted in Liverpool a number of meetings with the object of prosecuting what he termed a Protestant "crusade." At these meetings he used gestures and language which were calculated to insult and provoke Roman Catholics, and which did in fact cause breaches of the peace between his supporters and Roman Catholics who were present at the meetings. He threatened to repeat these meetings; he also, at one meeting, announced that he had been informed that the Roman Catholics were going to bring sticks and that he looked to his supporters for protection. A local Act prohibits, under a penalty, the use of threatening, abusive or insulting words or behaviour whereby a breach of the peace may be occasioned. *Held*, that the Liverpool stipendiary magistrate had jurisdiction to bind over the appellant in recognizances to be of good behavour.

Lord Alverstone, C.J.—This is an application by way of appeal from an order of the Liverpool stipendiary binding over the appellant to be of good behaviour. There are also in the order some words against committing a breach of the peace, but the actual form is not material because the words "to be of good behaviour" are also in the recognisance. . . . I am . . . of opinion that the magistrate was perfectly justified in putting the appellant under recognisances.

I do not think that it is necessary to go at great length into the various authorities that have been cited. I would only say that I am not able to find in them any difference of opinion as to the law which ought to be applied in such cases. It seems to me that any difficulty which may be experienced in reconciling them arises wholly from the fact that the law has been applied in them to different states of circumstances. I do not at all deny that different people may express very different opinions as to what ought to be the application of the law in particular cases. For instance, a passage has been called to our attention from a very learned lawyer and very great writer (Mr. Dicey), which, as I understand it, implies that the view taken by the Irish Courts is preferable to that taken in *Beatty* v. *Gillbanks* (*a*). It seems to me, however, that if the judg-

(*a*) *Ante*, p. 268.

ments of Mr. Justice Field and Mr. Justice Cave in the latter case are properly examined it will be found that the law as there laid down is not inconsistent with anything that has been stated by any of the very distinguished Judges in Ireland who have dealt with this matter and who have had unusual opportunities for dealing with it. I think that for this purpose is will be sufficient to cite some passages from the judgments delivered in these cases respectively. In his judgment in *Beatty* v. *Gillbanks*, Mr. Justice Field stated the law, in my opinion, with absolute accuracy He said: "Now I entirely concede that everyone must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the *appellants* they would be liable, and the Justices would have been right in binding them over. But the evidence set forth in the case does not support this contention." Lord Chief Justice O'Brien in *R.* v. *Londonderry Justices* (*a*) said: "No act on the part of any person was proved to show that it was reasonably probable that the conduct of the *defendants* would, on the day in question, have provoked a breach of the peace." I think it is important to emphasise that enunciation of the necessary test, because it has been pressed upon us that if the appellant did not intend to act unlawfully himself or to induce other persons to act unlawfully, the fact that his words might have led people so to act would not be sufficient. I would next refer to the passage from the judgment of Chief Justice May in the first case of *R.* v. *Cork Justices* (*b*), which was read by counsel for the respondent. I will not read the whole passage, although I think it is all-important from the point at which it commences with the citation of Blackstone onwards. He said: "This requisition of sureties must be understood rather as a caution against the repetition of the offence than any immediate pain or punishment. This caution is such as is intended merely for prevention without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen, and consequently it is not meant as any degree of

(*a*) 28 L. R. Ir. at p. 447. (*b*) 15 Cox C. C. at p. 84.

punishment, unless perhaps for a man's imprudence in giving just ground for apprehension." In the second case of *R.* v. *Cork Justices* (*c*) a very learned Irish Judge (Mr. Justice Fitzgerald), in the course of his judgment, said, after referring to the authorities: "Without citing further authority we may assume that where it shall be made reasonably to appear to a justice of the peace that a person has *incited* others by acts or language to a violation of law and of right, and that there is reasonable ground to believe that the delinquent is likely to persevere in that course, such Justice has authority by law, in the execution of preventive justice, to provide for the public security by requiring the individual to give sureties for good behaviour, and in default commit him to prison." I have referred to those cases, not for the purpose of endeavouring to deduce from them any new rule of law, but for the purpose of showing that in a number of cases different Judges have expressed the rule of law substantially in the same way, though, of course, in different language. They have all laid down what I may call the essential condition that there must be an act of the defendant which, if it is not an unlawful act in itself, would be likely to produce an unlawful act as its natural consequence.

Though I have dealt with the case in the manner most favourable to the appellant, I think it could really be put higher. There is in this case in my opinion, an all-important statute—that is, the Liverpool Improvement Act, 1842, which provides that any person who uses any threatening, abusive, or insulting words or behaviour, with intent to provoke a breach of the peace—which is not this case—or whereby a breach of the peace may be occasioned, may be summoned before the local magistrates and fined. Counsel for the appellant ingeniously argued that that provision was to have a very limited scope, and was merely meant to prevent persons from using with impunity in the streets of Liverpool language which might be less choice than it ought to be. That may have been one of the evils aimed at, but I cannot think it was the only one. It seems to me that the conduct of the appellant also comes

(*c*) 15 Cox C. C. 149.

within the scope of that legislation. We have here a distinct finding of fact by the magistrate, and an allegation in the information, that the appellant held a number of meetings in the public streets, the effect of which was that those highways were blocked by crowds of thousands of people, and that very serious contests and breaches of the peace took place, and we have a further finding that the appellant himself used, with respect to a large body of people of a different religion, language of a most insulting character, and challenged any one of them to get up and deny the truth of his remarks. It seems to me that the magistrate, in having regard to and making himself acquainted with the character of the population over whom he has to execute and administer justice, was only discharging his duty. Knowing as he did that there is in Liverpool a large body of persons of the Roman Catholic religion, the fact that the appellant used insulting language in the public street towards that body of persons was a circumstance which he was bound to take into account when considering the probable consequences of the appellant's acts. There is, in addition, a finding that, preparatory to one of the meetings, the appellant stated that he had received a letter informing him that the Catholics were going to bring sticks, and told his supporters that the police had refused to give him protection, and that he looked to them for protection. **No reasonable man, looking at those facts, can doubt that the police and the magistrate rightly concluded that the appellant, by holding these continual meetings, attended by increasing crowds, by using language insulting to a religious sect to which the larger number of persons present might belong, and by inviting his own supporters to give him protection, went very far indeed towards** *inciting* **the people, at any rate, to so behave as to occasion a breach of the peace.**

It may be that if this case was to be considered with reference to any one of the illegalities which it is suggested that the appellant committed, and threatened to repeat, further evidence might have been necessary; but in my opinion there was abundant evidence on this information to show that in the public street **he had been guilty of language which** *caused*

an obstruction, which was abusive, and which did tend to bring about a breach of the peace, and that he threatened and intended to be guilty of similar acts in another place. The fact that he had promised not to hold a meeting at one place, but had held it within a short distance of the spot on the same day, shows at any rate, that the magistrate was justified in taking precautions against him.

DARLING, J.—I am of the same opinion. I think it necessary to summarise shortly the facts which the magistrate had before him. We begin with the knowledge that the appellant called himself a Protestant "crusader." In order to carry on his crusade he supplied himself with a crucifix, which he waved about, and hung round his neck a lot of beads which obviously were designed to represent the rosaries used by Roman Catholics. Got up in this way, he confessedly made use of a number of expressions most insulting to the faith of the Roman Catholic population among whom he went. The magistrate has found that **the language which he used was provocative,** and that he was likely to use this kind of language again. Disturbances and riots had been caused by this conduct of his before. On the occasions in question large crowds assembled in the streets, breaches of the peace were committed, and a serious riot was only prevented by the intervention of the police. Now were not these disturbances the natural consequence of the appellant's conduct? Have not such disturbances happened over and over again by reason of such conduct? Every one of the cases that have been cited before us, both the Irish cases and *Beatty* v. *Gillbanks*, has arisen out of precisely this kind of conduct on the part of a person calling himself of one religion or another. . . . Now, as I say, the natural consequence of the conduct of such people has been to create the riots that have given rise to these cases. Counsel for the appellant said the natural consequence can only mean the legal consequence, but I do not think so. It seems to me that those proceedings, though illegal, were **the natural consequence of the eloquence of this crusader,** and that the magistrate was justified in binding him over to be of good behaviour. In *R.* v. *Londonderry Justices*, Lord Chief Justice

O'Brien said: "Now I wish to make the ground of my judgment clear, and carefully to guard against being misunderstood. I am perfectly satisfied that the magistrates did not make the order which is impugned, by reason of there having been, or there being likely to be, any obstruction to the highway, and that the true view of what took place is that the defendants were bound over in respect of an apprehended breach of the peace, and in my opinion, there was no evidence to warrant that apprehension." It is clear that if there had been evidence to warrant that apprehension the Lord Chief Justice would have held the magistrate's decision in that case to be right. It is said that the case of *Beatty* v. *Gillbanks*, which was decided in the English Court of Queen's Bench, is in conflict with that decision of the Lord Chief Justice of Ireland, who had authority for what he said. I am not sure that it is. I am inclined to think that, having regard to the passage which my Lord read from the judgment of Mr. Justice Field, the distinction between the cases is only one of fact. I do not hesitate to say, however, that if there be a conflict between the cases, I prefer the law as laid down in *R.* v. *Londonderry Justices*. I think that the statement of the law given in that case is correct, and that it was ample, apart altogether from the local Act of Parliament to which my Lord has referred, to warrant the stipendiary magistrate in coming to the conclusion to which he came in this particular case. I therefore think that his order was right.

160.

FIELD v. THE RECEIVER OF METROPOLITAN POLICE.

[1907] 2 K. B. 859.

A number of youths assembled at nine o'clock at night on the pavement of Martindale Road, Canning Town, shouting and using rough language and by force knocked down about fifteen feet of wall adjoining the pavement. On its fall the caretaker of the premises came out into the street and the youths dispersed. By s. 2 of the Riot (Damages) Act, 1886, "Where a . . . building in any police district has been injured or destroyed . . . by any persons riotously

and tumultuously assembled together, . . . compensation . . . shall be paid out of the police rate of such district to any person who has sustained injury by such . . . destruction." The owners having brought an action under this section the County Court Judge found that the youths assembled with the intention of knocking down the wall and that the mischief was done by the "riotous and tumultuous" conduct of the youths. *Held*, by the Divisional Court that the conduct of the youths did not constitute a riot.

PHILLIMORE, J.—Riot is a crime, a misdemeanour at common law. The writer who appears to require the fewest elements to constitute this crime, and who, therefore, is the strongest authority in favour of the plaintiffs, is Lord Coke. He says that riot is where three or more do any unlawful act, as to beat any man, or to hunt in his park, or take possession of another man's land, or cut or destroy his corn, etc. This would seem to imply that any assault or malicious injury to property done by three or more is a riot. It is to be observed, however, that if this is Lord Coke's meaning, he stands alone; . . . Blackstone follows Coke in his definition of rout—a definition which has been since abandoned by text writers, and he nearly follows Coke in definition of riot; but he makes it plain that there must always be force or violence to constitute a riot. Hawkins requires that the rioters should have an **intent mutually to assist one another against anyone who should oppose them in the execution of their enterprise,** and should actually execute the same in a violent and turbulent manner to the terror of the people (s. 1). A riot ought to be accompanied, he says, by some offer of violence either to the person of a man or to his possessions, as by beating him or forcing him to quit possession of his land or goods, etc. (s. 4); and there must be at least some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike terror into the people (s. 5). Stephen says that an unlawful assembly must be (1) with intent to commit a crime by open force, or (2) with intent to carry out any common purpose in such a manner as to give firm and courageous persons reasonable ground to apprehend a breach of the peace, and a riot is an unlawful assembly which has actually begun to execute its purpose by a breach of the peace and to the terror of the public. In *R.* v.

Soley (*a*) Lord Holt, C.J., says: "If I am writing a letter and three or more come hallooing and jogging me, is this a riot? No; it ought to be *in terrorem populi.*" In *R.* v. *Langford*, (*b*) where five persons were indicted for riot for ejecting an old man out of a cottage which they claimed, and then demolishing it, the conviction was supported because such force was used as to terrify the old man. . . . In *R.* v. *Cunninghame* v. *Graham* (*c*) Charles, J., largely relying upon the passages of Hawkins, instructed the jury that "a riot is a disturbance of the peace by three persons at the least, who, with intent to help one another against any person who opposes them in the execution of some enterprise or other, actually execute that enterprise in a violent and turbulent manner to the alarm of the people."

From these passages we deduce that there are **five necessary elements of a riot—(1) number of persons, three at least; (2) common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.** In this case element No. 1 was present. As to elements Nos. 2 and 3, there was evidence upon which the learned judge could have found their existence, though, as far as we can judge from the notes of the evidence and without seeing the witnesses, we think we should not have found the same way. But as to elements Nos. 4 and 5 there is no evidence. The youths ran away as soon as the single caretaker came forward; there is no reason to suppose that they would have resisted if he had come forward earlier and required them to desist. It is true that the caretaker's wife was frightened by the noise of the falling wall, but no one says that he was alarmed by the youths, though the witness may have been frightened by other youths on other occasions. Nor was the conduct of the youths such as would be calculated

(*a*) 11 Mod. 100.
(*b*) C. & M. 602.
(*c*) 16 Cox C. C. 420.

to alarm persons of reasonable firmness and courage. We cannot hold that there was a riot.

161.

R. v. ADAMS.

(1887) 22 Q. B. D. 66.

The prisoner seeing in a newspaper an advertisement by a young woman for a situation wrote to her a letter containing a proposal of immoral conduct. The letter did not reach the advertiser but was opened by her mother, who handed it to the police. The prisoner was convicted on an indictment which charged him with having unlawfully and maliciously written and published to the advertiser a defamatory letter of and concerning her and of and concerning her character for virtue and modesty. *Held*, that the conviction could be sustained because the letter might reasonably tend to provoke a breach of the peace.

Lord Coleridge, C.J.—It appears to me that there is a very short and plain ground upon which this conviction can be sustained. It is a conviction upon an indictment the third count of which charges that the letter there set out is a defamatory libel tending to defame and bring into contempt the character of the person to whom it was sent. I am of opinion that the letter is of such a character as that it tended to provoke a breach of the peace. At all events, **the sending of such a letter** to the person to whom it was sent **might,** under the circumstances of her position and character, **reasonably or probably tend to provoke a breach of the peace** on her part, or on the part of those connected with her. The jury must be taken to have found that it was a defamatory libel which was calculated to cause a breach of the peace; and on that short ground I am of opinion that the conviction must be affirmed on the third count of the indictment.

162.

JONES v. HULTON & CO.

[1909] 2 K. B. 444, affirmed [1910] A. C. 20.

The defendants published in their newspaper an article purporting to be an actual description of motor races at Dieppe. The writer of this descriptive sketch had used the following language: "'Whist, there goes A. J. with a woman who is not his wife, who must be, you know—the other thing!' whispers a fair neighbour of mine." The article went on to contrast the conduct of A. J. at Dieppe with his more austere behaviour at home. The name A. J. was an uncommon one and used by the writer of the article and the defendants in the belief that it was not likely to be that of an existing individual. However, a gentleman possessing that name brought an action for libel and produced witnesses to say that on reading the article they thought that it referred to him. The jury found that the article described an actual scene and an actual person. *Held*, that the plaintiff was entitled to succeed.

Lord Alverstone, C.J.—It was contended by the defendants that inasmuch as it must be taken that there was no intention to refer to the plaintiff, and that the only words which would connect the article with him were the name Artemus Jones, the action could not be maintained, inasmuch as the plaintiff failed to prove that the defendants falsely and maliciously published the libel of and concerning the plaintiff; but this contention in my opinion involves a fallacy. If an untrue and defamatory statement in writing is published without lawful excuse, and in the opinion of the jury upon the evidence it refers to the plaintiff, the cause of action is made out: see notes to Bullen and Leake, 3rd. ed., p. 304. No one doubts that the averment that the libel was written of and concerning the plaintiff is a material averment. The authorities cited by my brother Fletcher Moulton establish that proposition, but in my opinion no authorities are necessary; it has been so held for generations; but here the averment was made, and the question is whether the averment was proved; and that, as well as the innuendo founded thereon, was for the jury upon the evidence. . . . It is in my opinion clearly established by authorities, to some of which I will refer, that the question, if it be disputed, whether the article is a libel upon the plaintiff

is a question of fact for the jury; and in my judgment this question of fact involves not only whether the language used of a person in its fair and ordinary meaning is libellous or defamatory, but **whether the person referred to in the libel would be understood by persons who knew him to [be] the plaintiff.** This proposition is so well established that, but for the grave and strenuous argument addressed to us on behalf of the defendants, I should not have thought it necessary to refer at any length to the authorities which support the proposition. It was, however, contended that there was a distinction between the identity of the person supposed to be referred to in the article and the defamatory language used about that person. I know of no case in which this distinction has been drawn, but it seems to me, both upon authority and principle, that, both on the question of whether the alleged libel refers to the plaintiff and as to the meaning of the language used, the question is for the jury upon the evidence before them.

It seems to me that a very brief consideration will show that on principle this must be so. Take the case of a libel which uses a name; that name may or may not be conclusive as to the person to whom the libel is intended to refer. Just in the same way, if the libel speaks of a person by description without mentioning the name, in order to establish a right of action the plaintiff must prove to the satisfaction of a jury that ordinary readers of the paper who knew him would have understood that it referred to him. There is abundant authority to show that **it is not necessary for everyone to know to whom the article refers;** this would in many cases be an impossibility; but **if in the opinion of a jury a substantial number of persons who knew the plaintiff, reading the article, would believe that it refers to him,** in my opinion an action, assuming the language to be defamatory, can be maintained; and it makes no difference whether the writer of the article inserted the name or description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. **If upon the evidence the jury are of opinion that ordinary sensible readers, knowing the plaintiff would be of opinion that the article referred to him, the plaintiff's case is made out. . . .**

It was alleged by the defendants that the article on the face of it related to a fictitious person and that no reasonable person could think that the article referred to anyone. This was in my opinion for the jury, but there certainly was evidence from the article itself that the writer was purporting to describe that which he had himself seen and people whom he had himself observed. . . . Dealing now with the authorities, it is, I think, beyond dispute that, **apart from the question of express malice, the intention or motive with which the words are used is immaterial,** and that, if in fact the article does refer, or would be deemed by reasonable people to refer, to the plaintiff, the action can be maintained and proof of express malice is wholly unnecessary: see Lord Bramwell in *Abrath* v. *N. E. Ry.* (*a*) in which the following passage occurs: "That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper or printed books, and suppose that it was proved against them that a book so published had been read by an officer of the corporation in order to see whether it should be published or not, and that it contained a libel; an action lies there, because there is no question of actual malice or ill-will or motive." **What is passing in the mind of the writer is wholly immaterial, or what was his intention, if he has in fact published a libel upon the plaintiff:** see the cases collected in cap. v. of "Odgers on Libel" and the judgment in *Bourke* v. *Warren* (*b*) where Abbott, C.J., in summing up to the jury said: "The question for your consideration is, whether you think the libel designates the plaintiff in such a way as to let those who know him understand that he was the person meant." It is not necessary that all the world should under-

(*a*) 11 A. C. 247. (*b*) 2 C. & P. 309.

stand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant." The judgment of the House of Lords in *Le Fanu* v. *Malcolmson* involved the same proposition, and in my opinion the statement of the law by Lord Blackburn in the case of *Capital and Counties Bank* v. *Henty* (*c*) is conclusive of the point: "In construing the words to see whether they are a libel the Court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey that imputation; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences though his object might have been to injure another person than the plaintiff, or though he may have written in levity only."

163.

R. v. MUNSLOW.

[1895] 1 Q. B. 758 (C. C. R.).

By s. 5 of the Libel Act, 1843, "any person who shall maliciously publish any defamatory libel," is punishable by fine and one year's imprisonment. An indictment charged M. with "unlawfully" publishing a defamatory libel but did not aver that it was published "maliciously." *Held*, that the section did not create a new offence but merely fixed the punishment for a common law offence, that at common law an averment of malice was not necessary and that the indictment was therefore good.

Lord Russell of Killowen, C.J.—This indictment charges the defendant in each count with having unlawfully written and published a defamatory libel, the word "maliciously," which is commonly used in such indictments, being omitted; had the words "unlawfully and maliciously" been employed,

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(*c*) 7 A. C. 741.

the case would not now be before us. For myself, I must say that, in my opinion, it would be a deplorable, if not an absurd, state of the law if such an omission could not be cured by verdict. However, an objection was taken before the case went to the jury, which was in effect that the indictment was bad and the question for us to consider is whether it was bad. That the case was intended to be presented to the jury as being within s. 5. of the Libel Act, 1843, is clear; it was so presented to them; but how and for what purpose? What is the true effect of the section? It provides that if any person maliciously publishes a defamatory libel he shall, being convicted thereof, be liable to fine or imprisonment or both; the section does not therefore, as its language shows, create a new offence, nor does it purport to give a definition of an existing offence, but it provides for the application to that which was already an offence at common law of the appropriate punishment on conviction for that offence. It follows, therefore, that cases in which the offences dealt with are the creations of statute and are defined by particular statutory language, many of which have been cited to us, have no pertinence to the point raised before us to-day. The word "maliciously" was introduced into the section in order to prevent the section working great injustice. **Anyone who publishes defamatory matter of another tending to damage his reputation or expose him to contempt and ridicule is guilty of publishing a defamatory libel, and the word "maliciously" was introduced in order to show that, though the accused might be** *primâ facie* **guilty of publishing a defamatory libel, yet if he could rebut the presumption of malice attached to such publication he would meet the charge.** For example, upon the production of the alleged libel, it is for the **judge** to determine whether it is **capable** of being regarded as a libel by the jury; his function is then ended, and if the jury determine it to be a libel, then, in the absence of evidence of the motive for publication, the law attaches to the fact of publication the inference that the publication was malicious. But the accused may be able to show that, though the matter is defamatory, it was published on a privileged occasion, or he

may be able to avail himself of the statutory defence that the matter complained of was true, and that its publication was for the public benefit; and those classes of cases were meant to be excluded from the purview of the section by the use of the word "maliciously."

Here the case went to the jury after the objection was taken, and we must assume that the language was capable of bearing the innuendoes placed on it and was capable of being a libel, that the jury found that it was in fact a libel, and that there was no lawful excuse, such as privilege, for its publication. In that state of facts is the prisoner to be absolved from the consequences of the verdict, and is the conviction to be quashed merely because the word "maliciously" has been omitted from the indictment? The argument for the defendant is in effect that the indictment is an indictment under the statute, and is in respect of an offence under the statute; but, in my judgment, that is a mistaken view; the indictment is for a common law offence, but is so framed as to bring it within the section for the purpose of punishment. If that is so, is the indictment bad for omitting the word "maliciously"? It is common ground that the rules of pleading in civil and criminal cases do not differ; if, therefore, the authorities show that in an action for libel the declaration is good on demurrer, although the word "maliciously" is omitted, that would be an authority for holding that an indictment is not bad by reason merely of omitting it. No doubt the law implies malice from the publication of defamatory matter; but that implication, as I have already said, may be rebutted.

The first authority to which I need refer is *R.* v. *Harvey* (*a*). In that case the defendants were indicted for a libel imputing mental insanity to George IV., and though the point was not taken upon an objection to the indictment the language of the Judges upon a motion for a new trial on the ground of misdirection throws light upon the subject. The jury at the trial required to know from the Lord Chief Justice whether it was necessary that there should be a

(*a*) 2 B. & C. 257.

malicious intention in order to constitute a libel, and the answer given was: **"The man who publishes slanderous matter, in its nature calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary."** Upon the motion for a new trial Bayley, J., said that in his opinion the direction was right, and that the falsely making the assertion made by the defendants was evidence that they made it maliciously. The language of Holroyd, J., is more direct as to the necessity of an allegation of malice. He says: "It is not necessary to aver in such an indictment any direct malice because the doing of such an act without any excuse is indictable; . . ."

That case was followed by *Bromage* v. *Prosser* (*b*), which was an action for slander; but on this point there is no difference between actions for slander and for libel. In delivering the judgment of the Court, Bayley, J., says: . . . "In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. . . . I need only refer to one more case, that of *Heymann* v. *Reg.* (*c*), where it is laid down that at common law there is no distinction between the pleadings in civil cases and criminal cases; the general principle therefore is, that civil and criminal pleadings are the same where the criminal proceedings are not taken under a statute defining the offence in particular language. I have come therefore to the conclusion that this indictment is perfectly good; it would be monstrous if it were held bad. For myself I should be ready, if it were necessary, to say that an averment that a defendant "unlawfully wrote and published" a defamatory libel may, when it is being considered after verdict, be treated as an imperfect averment. I do not decide, however, upon that ground, but upon the ground that the indictment is good, that it is not in respect of an offence under or created by the section, and that the true view of the section is that it enjoins the character of the punishment to be awarded to an existing offence.

(*b*) 4 B. & C. 247. (*c*) L. R. 8 Q. B. 102.

164.

ADAM v. WARD.

(1917) 86 L. J. K. B. 849 (H. L.).

The appellant, in a speech made in the House of Commons, made an attack upon the character of Major-General S., who appealed to the Army Council for enquiry. The defendant, who was the secretary of the Council and acted under its directions, issued through the Press a letter addressed to Major-General S. clearing him of the charge and containing statements defamatory of the appellant. *Held*, (i.) that the occasion of the letter was privileged, it being the duty of the Army Council to inquire into the truth of the charges against Major-General S. and to make the result of that inquiry known as widely as possible; (ii.) that there was no evidence of express malice.

Lord Dunedin.—The primary fact is the speech made by the plaintiff in the House of Commons. . . .

That the words used contained an imputation on Major-General Scobell's honour no one can doubt. Under the King's Regulations, already referred to, the General could not deal with the matter himself, but was bound to do what he did—bring the matter before the Army Council, and ask them to enquire as to the truth of the accusation made against him.

On this it appears to me clear that there arose on the part of the Army Council a duty—not only moral, but actually legal under military law—to make the enquiry demanded. In what particular way or form the enquiry should be held was, I think, a matter for them and for no one else to determine. The Army Council proceeded to institute an enquiry, but before doing so they called on the plaintiff to furnish them with any statement which he might wish to make "in amplification or substantiation" of the charge which he had made. To this the plaintiff replied that, as the enquiry was to be conducted by themselves, and as the Army Council "had forfeited the confidence of the Army and the public," he did not propose to do anything more.

The Army Council accordingly held the enquiry within, so to speak, their own walls. They came to the conclusion that the charge made was unfounded. They wrote a letter to

Major-General Scobell telling him so, and they published that letter.

Now if the matter is thus baldly stated, can it for a moment be supposed that this publication is not a performance of a moral, if not even of a legal duty, and as such privileged? Let us look at the situation. Major-General Scobell is grossly attacked in a speech in the House of Commons—a speech which in that place, from motives of high public policy, is protected by absolute privilege. Under the King's Regulations he may not take up the matter himself and defend himself in the public Press. He is bound to refer the matter to the Army Council, and await their verdict. The verdict is in his favour. What would that avail him, unless there was a right in the Army Council to publish the result at which they had arrived? If it were not so, then the absolute privilege of the House of Commons, intended to safeguard the liberty of discussion, would be really turned into an abominable instrument of oppression.

Two replies are, however, made to this, which I shall take in their order. It is said first, that the publication here was to an unduly wide public—that there was no duty to publish to everyone, but only to those who were likely to have become aware of the accusation, and that to make such a wide publication as was here made was in accordance with no duty or right. I think that a man who makes a statement on the floor of the House of Commons makes it to the world. True it never reaches every person in the world. In some cases, if the orator is unknown to fame and the statement intrinsically unexciting, it may not reach very many. But no one knows whom it may reach, and it was only, I think, plain justice to Major-General Scobell that the ambit of the contradiction should be spread so wide as, if possible, to meet the false accusation wherever it went. Do what you will, the stern chase after a lie which has got the start is apt to be a long one. As a matter of fact, the Army Council instructed their secretary, the defendant, to send the communication to the channels to which they ordinarily send all official communications. The list is a long one, and the ambit of influence is

wide; but, in my judgment, the list was not longer, or the ambit wider, than was demanded by justice to Major-General Scobell.

The second reply raises what is, I think, the real and only point in the case. I have hitherto dealt with the communication as if it was a bald statement of the unfoundedness of the charge against Major-General Scobell; but the letter was a long one, and it is urged that, in so far as it went beyond the mere statement of Major-General Scobell's innocence and proceeded to say things defamatory of the plaintiff, it was not in the exercise of any duty or right, and that for these statements there is no privilege. . . .

What now is the situation? You have a communication issued on a privileged occasion, and *in gremio* of that communication are used words which are in themselves defamatory. What test is to be applied? On the one hand, it is said that, the occasion being privileged, the whole document is privileged, but that if in the document you find parts which are not really necessary to the fufilment of the particular duty or right which is the foundation of the privilege on the occasion, then these parts may be used as evidence of express malice. In other words, it stands thus: **Malice, which is of the essence of libel, is presumed from defamatory words. Privilege destroys that presumption; but the place of the implied malice which is gone may be taken by express malice, which may be proved. It may be proved either extrinsically or intrinsically of the document, and such words in the document are apt as evidence.** Thus Lord Justice Buckley states as to the whole matter: "There are two questions. The first whether the occasion was a privileged ocasion; and if it was, then, secondly, whether there was any evidence of malice.

On the other hand, it is said that it is not necessarily a question of malice at all; that privilege applies to what is written and published in response to a duty or right; and that if anything is found in the thing published which is not reasonably appropriate to that duty or right, then privilege cannot extend to it. I think it will be found that in most cases these are merely two ways of expressing the same point.

But there is this to be said in favour of the former method—that it is a formula which as a test will fit most, if not all, cases, whereas the second would necessarily break down in a good many; for it could always be said with apparent force that it never can be necessary to incorporate in a statement made in response to a duty or right any defamatory statement which is not logically necessary to fulfil that duty or right. Thus cases like *Spill* v. *Maule* (*a*), "most disgraceful and dishonest," and *Laughton* v. *Sodor and Man* (*Bishop*) (*b*), "bear false witness against a neighbour," would, if tried by this latter test alone, be held to be wrongly decided, although, as a matter of fact, I do not think that it is suggested that they were anything but right; and, in my opinion, they were right, as indeed becomes evident if they are tried by the first test.

I have not said that the first test is universally applicable, and for this reason. If the defamatory statement is quite unconnected with and irrelevant to the main statement, which is *ex hypothesi* privileged, then I think it more accurate to say that the privilege does not extend thereto, than to say, although the result may be the same, that the defamatory statement is evidence of malice; but when the defamatory statement is, so to speak, part and parcel of the privileged statement and relevant to the discussion, then I think the first way is the true way to put it, and under it will also range all the cases where the express malice is arguable from the too great severity or redundancy of the expressions used in the privileged document itself. In short, I adopt the law as laid down by Lord Esher, M.R., in the case of *Nevill* v. *Fine Arts and General Insurance Co.* (*c*). The learned Judge there says: "in this case there was no evidence of such malice. That being so, the defendants have proved that the occasion was privileged, and there was no evidence of malice in the mind of anybody to rebut that privilege, and the defence stands good. But then the jury were asked to find, and have found, that the privilege was exceeded. There may be an

(*a*) (1869) 38 L. J. Ex. 138; L. R. 4 Ex. 232.
(*b*) (1872) 42 L. J. P. C. 11; L. R. 4 P. C. 495.
(*c*) [1895] 2 Q. B. at p. 17; 64 L. J. Q. B. at p. 170.

excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it. Instances have been put during the argument of cases where a defendant on an occasion which is privileged as between himself and some other person makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion, in which case, of course, that third person would have a right of action against the defendant, and, as between him and the defendant, there would be no privileged occasion." A good illustration of this will be found in the case of *Warren* v. *Warren* (*d*). "But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice."

This question is of necessity closely connected with the question of the respective functions of the Judge and of the jury. I do not think it necessary to analyse the very numerous decided cases which were cited to us in the course of the argument. I have studied them all, and what I am about to say is, I believe, the true doctrine to be drawn from them. But it may be as well to make this remark—that certainly some confusion has resulted from the use of the convenient phrases "privileged statement" and "extension of the privilege." **Strictly speaking, it is the occasion on which a statement is made that is privileged;** and the phrase that such-and-such a statement is privileged would be more accurately, although perhaps more clumsily, expressed by saying that, the statement having been made on a privileged occasion, malice cannot be implied from defamatory expressions therein, but must be proved as a real fact. The malice to be proved must be real malice, and is generally called "express malice" to distinguish it from the malice which is implied from the defamatory words themselves. The duty of deciding whether the occasion is privileged is cast upon the Judge alone, and the jury has no hand in it. The criterion as to whether the occasion is privileged or not is most tersely

(*d*) 3 L. J. Ex. 294; 1 Cr. M. & R. 250.

stated in the well-known passages of Baron Parke's judgment in *Toogood* v. *Spyring* (*e*): ". . . **fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned**"; and again: "**If** *fairly* **warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.**" And the Judge must put the question suggested by that definition to himself. If the statement is, so to speak, divisible into parts, it may be that the Judge may come to the conclusion that certain parts are not truly referable to the particular right or duty, which in the case in hand is the foundation of the privilege. If so, he will so find—that is to say, he will find that paragraph 1 is referable and appropriate to a privileged occasion; paragraph 2 is not so. Then if paragraph 2 contains defamatory words, malice will be implied as to them. If, however, he finds that both paragraphs are referable and appropriate to the privileged occasion, then, as it is more commonly but less accurately expressed, he finds that the privilege extends to the whole statement. In that case the next question which he has to put to himself is whether the defamatory words complained of are capable of affording, from their own nature alone, evidence of express malice. If he holds them incapable, and there is no other evidence extrinsic of the document, then the plaintiff's case is gone, and the jury has not to be called upon at all; but if the Judge thinks that the words are so capable, then he must leave it to the jury to say whether from the words alone, or in conjunction with extrinsic evidence, if there be any such, express malice has been proved. It might thus occur, although the case will probably be rare, that, as above imagined, defamatory words in the non-privileged paragraph 2 could afford evidence of express malice in connection with the expressions used in the privileged paragraph 1.

I need scarcely add, but it makes the statement complete

(*e*) 3 L. J. Ex. at p. 351; 1 Cr. M. & R. 181, at p. 193.

to do so, that **if there is controversy as to whether the words used are defamatory or not it is for the Judge to determine whether they are capable of a defamatory meaning; and that being resolved in the affirmative, it is for the jury to find whether they are actually defamatory or not.**

I now return to the facts of this case; and here I am of opinion, concurring with the Lord Chancellor, that the present case is a case where the defamatory statement was part and parcel of the privileged statement and relevant to it. A grave charge had been made against Major-General Scobell, but it had been made in the guise of calling attention to the grievance of brother officers—particularly one officer—of the plaintiff. It was relevant to show that in so doing the plaintiff was really airing his own grievance, "*Mutato nomine de te fabula narratur*"; and I think that the Army Council were entitled to say so. In doing so they used the expression relative to the plaintiff of "removed from the regiment," an expression which in the innocent sense was true and not defamatory, for the plaintiff had been removed from his regiment by being sent to headquarters and subsequently put on half pay. It is true that it must be taken as settled that the expression must be regarded in a defamatory sense; but though that is so, it is well settled that express malice cannot be held as proved from the mere fact of the expression being defamatory—*Spill* v. *Maule* (*f*) and *Laughton* v. *Sodor and Man* (*Bishop*) (*g*); and, further, when considering whether the actual expression used can be held as evidence of express malice no nice scales should be used. I would particularly cite the words of the judgment of the Privy Council in the latter case (*h*): "Some expressions here used undoubtedly go beyond what was necessary for self-defence, but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection

(*f*) *Ubi supra*
(*g*) *Ubi supra.*
(*h*) 42 L. J. P. C. at p 16; L. R. 4 P. C. at p. 508.

which the law throws over privileged communications." This disposes of the first passage pointed out as defamatory.

Then comes the only other passage relied on where the letter says that the plaintiff had been called upon to retire "in consequence of adverse reports which were duly communicated to him." But this is only said as a preface to pointing out that Major-General Scobell, whom he had accused of deliberately making false statements, in virtue of which injustice had been done to regimental officers, of whom he was one, had, so far from being actuated by hostile bias against him, been the very man to intercede at Headquarters for the plaintiff, with the result of persuading the authorities to give him another appointment. Indeed, when we come to the language, it is, in my opinion, strictly accurate; . . . But even if this were not so, the same argument would prevail, as I have already stated in regard to the expression "removed from the regiment."

I am accordingly of opinion that privilege attaches to the statement here complained of; that no malice can be implied; and that to succeed the plaintiff must prove express malice. As to express malice, all the learned Judges, including the trial Judge, are agreed that there is absolutely no evidence, either extrinsic or intrinsic, of malice on the part of the defendant, Sir Edward Ward. For my own part I fail to see how, if it was once shown that Sir Edward Ward was merely obeying orders when he signed the statement drawn up by the Army Council and sent it for publication, and was relying, as he was entitled to do, on the privilege which attached to the action of his superior and principal, the Army Council, any evidence as to malice on his part could be relevant. It is not necessary, however, to decide that question. It is only necessary to add that there is not a shred of evidence of malice on the part of the Army Council. Their malice, in my view, would be relevant; but as it does not exist, it is unnecessary to consider that question either.

There are two other matters which, although not affecting the judgment to be pronounced, ought, in my opinion, to be mentioned. The learned Judge who tried the cause took what

I believe is a very unusual course in two particulars. He disposed of the question of malice while the question of privilege was still unsettled. I do not know if this can be said to be wrong, but at least it is highly inconvenient. The second matter is more serious. In order to dispose of the question of privilege he put to the jury certain questions, of which three were as follows: Was the publication—that is, the document published—of a public nature? Was the subject-matter of that publication by the defendant matter about which it was proper for the public to know? Was the matter contained in the letter proper for the public to know?—to all of which the jury returned a negative answer; and upon that the learned Judge said, "On these findings I hold that the publication was not a privileged publication, nor a publication on a privileged occasion, . . ." It is clear that, so far as the questions go, they assume that the foundation of the duty or right which was invoked to support the privilege was that the matter discussed was one of public importance, whereas the true foundation in this case was the duty of the Army Council to make publicly known their vindication of Major-General Scobell's honour. But apart from that, and in view of what I have already stated as to the provinces of Judge and jury, I entirely agree with the learned Judges of the Court of Appeal, who held that these questions were for the Judge, and not for the jury. If there is some fact left in controversy which must necessarily be determined one way or the other to allow the Judge to view the complete situation, and thus enable him to decide whether the occasion was privileged or not, it would be right for the judge to ask the jury to determine that fact; but to put to them questions such as these, and then on the findings to find privilege or the reverse, is simply to ask the jury to decide for him the question which it is his duty, and not theirs, to determine.

Lord Atkinson.—. . . It was not disputed in this case on either side that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made; and the person to

whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. Nor is it disputed that a privileged communication—a phrase often used loosely to describe a privileged occasion, and *vice versâ*—is a communication made upon an occasion which rebuts the *primâ facie* presumption of malice arising from a statement prejudicial to the character of the plaintiff, and puts the latter on proof that there was malice in fact—Baron Parke in *Wright* v. *Woodgate* (*i*). Nor that the question of whether the occasion is a privileged occasion or not is, if the facts are not in dispute, or if in dispute have been found by the jury, a question of law to be decided by the Judge at the trial. Nor yet that a person making a communication on a privileged occasion has not, in the first instance, and as a condition of immunity, to prove affirmatively that he honestly believed the statement made to be true, his *bonâ fides* being in such a case always presumed—*Jenoure* v. *Delmege* (*k*) and *Clark* v. *Molyneux* (*l*). All these matters were not questioned. They could not be questioned successfully. Nor was it suggested that, while on the question of malice the *bonâ fide* belief of the defendant that he was under a moral or social duty to make the communication is relevant and important, the existence in fact of this duty or interest—not merely the defendant's belief in its existence—is the thing which is relevant to the question whether the occasion was or was not privileged—*per* Lord Lindley in *Stuart* v. *Bell* (*m*). It was, however, strenuously contended on the part of the appellant, as I understood, that the language used in a communication made on a privileged occasion must, if it is to be protected, merely be such as is reasonably necessary to enable the party making it to protect the interest or discharge the duty upon which the qualified privilege is founded. It has, I think, long been established by unquestioned and unquestionable authority that this is not the law. This point is of such importance that one may be excused for referring at length to three authorities to show

(*i*) (1835) 2 Cr. M. & R. 573—577.
(*k*) [1891] A. C. 73; 60 L. J. P. C. 11.
(*l*) (1877) 3 Q. B. 237; 47 L. J. Q. B. 230.
(*m*) [1891] 2 Q. B. 341, 349; 60 L. J. Q. B. 577, 580.

what the law on the subject really is, and in what light the language used in privileged communications is in a Court of law to be regarded (*n*). . . .

These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege, but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, although in fact it was not so. It was next urged on behalf of the appellant that the Army Council should have confined themselves to stating that the charges made against Major-General Scobell were on investigation found to be unfounded, and that he had been fully exonerated; and, therefore, that all the references contained in the libel to the appellant himself, his conduct, career, or the treatment he received, were foreign and irrelevant subjects, not pertinent to the discharge of the duty or to the protection of the interest which form the basis of the privilege claimed, but were separable from the relevant parts of the libel, and, to use the words of Lord Esher, were outside the privileged occasion and had nothing to do with it, and that, since to afford a defence the whole communication should be within the protection of the privileged occasion, if part only were so, the entire communication ceased to be a privileged communication or to be protected. Some question was raised as to whether the presiding Judge was the person to decide whether any foreign and irrelevant matter had been introduced into the libel, and whether it was separable. I think that it must be the Judge who is to do so. He it is who must decide whether the occasion is privileged or not; and if that be so, he must necessarily decide in respect of what portion of the libel the occasion would be privileged if it stood

(*n*) These authorities are *Spill* v. *Maule (ubi supra)*; *Laughton* v. *Sodor and Man (Bishop)*, (*ubi supra*); and *Nevill* v. *Fine Arts and General Insurance Co.* (*ubi supra*).

by itself. A more difficult question, however, remains, upon which the authorities cited give little, if any, assistance. It is this. What would be the effect of embodying separable foreign and irrelevant defamatory matter in the libel? Would it make the occasion of the publication of the libel no longer to any extent privileged, or would those portions of the libel which would have been within the protection of the privileged occasion, if they had stood alone and constituted the entire libel, still continue to be protected, the irrelevant matter not being privileged at all, and furnishing possible evidence that the relevant portion was published with actual malice? In the absence of all guiding authority the latter would, in my opinion, be more consistent with justice and legal principle, and I think that it is in law the true result. Owing, however, to the view which I take of the contents of the libel, this question is, to my mind, a purely academic one. . . . I do not think that any foreign or irrelevant matter has been introduced into the libel; but as the point has been raised and fully argued, and is itself of importance, it is, I think, desirable to decide it. I have accordingly expressed my opinion upon it.

Some argument was directed to the defendant's precise position in relation to this libel, his rights, duties, and privileges, his feelings towards the appellant, and his express or implied malice. I think that his position is plain. He was the mere agent of the Army Council, bound to obey their orders or resign his post—the mere instrument through whose hands the libel passed for publication. His own personal feelings or privileges are, I think, not involved in the case at all. He had nothing whatever to do with the composition of the libel or the approval of its contents. In the mere routine of the work of the office he signed his name to it, and passed it on for publication in the way and over the area usual in such cases. To suppose that it was his duty to attempt to dissuade his principals from publishing the libel, to criticise their language, or, save at their request, to alter it, is in my view, quite absurd. It is no doubt true that one cannot defend himself for publishing a libel simply by saying that another person whom he was bound to obey ordered him

to publish it; but it is equally true that when an agent, in obedience to the command of his principal, merely does the mechanical act of publishing the libel handed to him complete, the privilege of the principal becomes, as it were, his privilege, and if the principal has caused the communication to be made to protect the interest or discharge the duty which would have made the occasion privileged, if he had published the libel with his own hand, the agent can equally rely on the publication having been made on a privileged occasion. For this purpose he stands, in my view, in the shoes of his principal, has the same rights and the same liabilities. I think this follows from the reasoning of the judgments in *London Association for Protection of Trade* v. *Greenlands, Lim.* (*o*).

165.

R. v. CARDEN.

(1879) 5 Q. B. D. 1.

A magistrate has no jurisdiction to receive truth of the libel where the defendant is charged under s. 5 of the Libel Act, 1843, with maliciously publishing a defamatory libel; but he may do so where the defendant is charged under s. 4 of the Act with malicious publication of a defamatory libel, knowing the same to be false (*a*).

COCKBURN, C.J.—It is said that in this case the magistrate has declined jurisdiction. That involves the question whether he had jurisdiction to hear this evidence. I am clearly of opinion that he had not. **The duty and province of the magistrate before whom a person is brought, with a view to his**

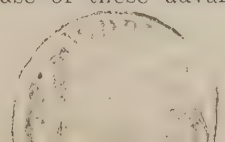
(*o*) [1916] 2 A. C. 15; 85 L. J. K. B. 698.

(*a*) And by s. 4 of the Newspaper Libel Act, 1881, on the hearing of a charge against a publisher, proprietor, or editor or person responsible for the publication of a newspaper for a libel published therein, a court of summary jurisdiction may receive evidence as to the publication being for the public benefit, *and as to the matters charged in the libel being true*, and as to the report being fair and accurate, and published without malice, and as to any other matter which might be given in evidence by way of defence at the trial on indictment, and the court, if of opinion after hearing such evidence that the jury would probably acquit the defendant, may dismiss the charge.

being committed for trial or held to bail, is to determine, on hearing the evidence for the prosecution and that for the defence, if there be any, whether the case is one in which the accused ought to be put upon his trial. It is no part of his province to try the case. That being so, in my opinion, unless there is some further statutory duty imposed on the magistrate, the evidence before him must be confined to the question whether the case is such as ought to be sent for trial, and if he exceeds the limits of that enquiry, he transcends the bounds of his jurisdiction. This case was one of a charge of libel, and the magistrate had to inquire, first, whether the matter complained of was libellous, and secondly, whether the publication of it was brought home to the accused, so far as that there ought to be a committal. It is argued that he ought to do more, and to receive evidence to show the truth of the matter complained of as libellous. I meet that proposition with an unhesitating negative. By common law, independently of statute as settled prior to Lord Campbell's Act (6 & 7 Vict. c. 96), whatever may have been the state of things in more ancient times, the truth of the matter complained of constituted no defence to a criminal charge of libel. It can only become a defence under the statute, and then only when the statutory conditions are complied with. Therefore, independently of statute, the magistrate could not receive evidence of the truth of the libel. The question then arises whether Lord Campbell's Act enables him to do so. In my opinion it does not, because by the provisions of the Act the defence founded upon the truth of the libel does not arise at that stage, and cannot be put forward before the magistrate. The test of this is the question which I asked during the argument, but to which I received no satisfactory answer. Suppose the defendant had succeeded fully and entirely in showing the truth of the libel. What then would have been the duty of the magistrate? He would nevertheless have been bound to send the case for trial, because by the statute the truth of the libel does not constitute a defence until the statutory conditions are complied with, and they cannot be complied with at that stage of the inquiry. There

must first be commitment or holding to bail, then indictment, and then a plea such as may satisfy the exigency of the statutory conditions. Until then the truth of the libel cannot be set up as a defence. How then could it be the duty of the magistrate to enter upon an inquiry into the truth of the libel, seeing that if the truth of it had been established he was still bound to commit? It seems to me abundantly clear that any such inquiry was beyond the province of the magistrate, as being irrelevant to the matter he had to determine, viz., whether the case as laid before him was sufficient to call upon him to commit or hold the accused to bail. If such a case is made out before him, then a defence, that cannot be raised until after the indictment has been found and a plea pleaded in accordance with the conditions imposed by the statute, is entirely beyond his province and jurisdiction.

Then it was argued that although the truth of the matter complained of could not be made use of as a defence at that stage of the proceedings, so as to justify the magistrate in declining to commit, still the evidence should have been received with a view to its being available for a collateral purpose, viz., the perpetuation of testimony. But, when I look to the statutes that have been referred to, I find no mention of perpetuation of testimony. **The perpetuation of testimony is no doubt one of various very great incidental advantages arising from the provisions of the statutes relating to the duties of justices in these matters. In the first place those who have to frame the indictment have the advantage of seeing the whole of the evidence on the depositions, and of being able to adapt the indictment to it. The judge also is enabled to make himself acquainted with the facts before the trial. Again, if there is any discrepancy between the deposition of a witness and his statement at the trial, this may afford substantial grounds for shaking his evidence. Lastly if a witness dies, or is too ill to attend, his testimony is perpetuated.** But, although these are advantages incidental to the mode of taking evidence before magistrates prescribed by the statutes, I find nothing in these statutes to warrant the conclusion that because of these advantages the magis-



trate may exceed the limits of his proper jurisdiction, and enter into an inquiry altogether foreign to the question upon which he has to determine.

Then it was said that this evidence was receivable to show that the matter complained of was a fair comment on the conduct of a public man. The fallacy of this argument is so transparent as to render it hardly worth discussion. It is true that a comment upon given facts, which would otherwise be libellous, may assume a privileged character, because, though unjust and injurious, yet being founded on facts not in themselves libellous, it is a comment which anyone is entitled to make upon a public man. For instance, suppose that anyone states facts not in themselves libellous of a candidate for election to Parliament, and on them bases the conclusion that he is not an honest politician. The comment may be injurious, but it may be privileged as a fair comment on the facts, if not malicious, because made on a public man.

On the other hand, to say that you may first libel a man, and then comment upon him, is obviously absurd. If you say that a man has committed such and such a crime, and therefore he is so and so, you cannot, because he is a public man, justify not only your comment, but also the facts which you state. In the present case facts were stated independently of the comment. The libel says Mr. Lawson is so and so, and therefore he is a disgrace to journalism. If you state a number of libellous facts, you cannot justify them on the ground that they are comments on a public man. You may comment on facts, and your comment, if made on a public man, may possibly escape the penalty of libel, though injurious, because it is privileged; but the statement of facts must not be libellous, or you must be prepared to prove the truth of it. Here the facts are clearly libellous, unless the truth of them could be proved, and that could not be done until a later stage. In every point of view, therefore, we come to the conclusion that the evidence was not receivable before the magistrate. There is only one ground on which anything like an urgent case for the reception of such evidence can be rested, as it was rested by the learned counsel who

appeared for the applicants, viz., the possibility that one or more of the witnesses might die or fall ill before the trial. The prosecutor, for instance, might die, and so the defendant be deprived of the benefit of his cross-examination. After the indictment is preferred the whole of this evidence, if admissible, may be received at the trial; but the danger upon which so much reliance has been placed does not seem to us to afford a sufficient reason for extending the provisions of the statutes beyond their natural limits.

It was argued by Mr. Russell that it was intended by Russell Gurney's Act to enable an accused person to obtain evidence and to perpetuate evidence by calling witnesses before the magistrate, with the view of establishing anything which at any time throughout the whole course of the inquiry, not only before the magistrate, but afterwards at the trial, could possibly have any relevancy in his favour. But, as I have already said, the object of the statute does not seem to me to be the perpetuation of testimony, and I do not think the magistrate has power to receive evidence for a collateral purpose wholly foreign to his jurisdiction. The test of the admissibility of evidence before the magistrate, in my opinion, is its relevancy to the inquiry into the offence with which the accused is charged, viz., whether there is a case upon which he ought to be committed for trial or held to bail. For these reasons I am of opinion that the rule must be discharged.

166.

R. v. PEASE.

(1832) 4 B. & Ad. 30.

By 1 & 2 Geo. IV. c. 44, a company was incorporated for the purpose of making a railway and in the statute it was provided that the railroad should not deviate more than 100 yards from a course laid down in a map deposited with the clerk of the peace. By s. 8 of 4 Geo. IV. c. 32, it was enacted that "it shall be lawful for the said company . . . to make and erect such and so many locomotive or moveable engines as the said company shall . . . think proper and expedient and to use and employ the same in or upon

the said railways." The railway ran parallel to an ancient highway, being in some places within five yards of it and as a result horses or persons using the highway were frightened. *Held*, that the company was not indictable for a nuisance, since the statute gave an unqualified authority for the use of the engines.

PARKE, J.—**The case turns upon the meaning of the** eighth section of the **statute** 4 Geo. IV., c. 23, and the question is, whether that section gives an authority to the company to use locomotive engines on the railway absolutely, or only with some implied condition or qualification that they should employ all practicable means to protect the public against any injury from them? . . . Now **the words of the clause** in question **clearly give to the company the unqualified authority to use the engines;** and we are to construe provisions in Acts of Parliament according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be extended or modified; . . .

Let us, then, consider, whether there is anything unreasonable, or contrary to the express or implied intention of the Legislature, in construing these words in their ordinary sense, and without any such condition or qualification as before mentioned. It is clear that the makers of this, and the prior Act, had in view the construction of a railroad (with its branches) in a certain defined line which . . . had been delineated on a map, deposited with the clerk of the peace, and from which line the road was not to deviate more than 100 yards, and not into the grounds of persons not mentioned in the book of reference. The Legislature, therefore, must be presumed to have known that the railroad would be adjacent for a mile to the public highway, and consequently that travellers along the highway would be, in all probability, incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unreasonable or inconsistent in supposing that the Legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good

to be obtained by other parts of the public in the more speedy travelling and conveyance of merchandise along the new railroad. . . . It is true that the same object, that of giving one part of the public the benefit of the use of these engines, might have been effected without the same injury to the other part using the road, if the Act had imposed on the company the obligation of erecting a sufficient fence or screen, at their own cost; or had provided that the line of road should be different at that place; but it is by no means necessary to imply such an obligation in order to make the clause reasonable and consistent, for it has been shown to be so without it; and it is natural to suppose that if such a condition had been intended it would have been particularly expressed.

For these reasons, we think that the defendants were justified under the above-mentioned section of the 4 Geo. IV., and therefore that the judgment of the Court should be in their favour.

167.

R. v. THE BRADFORD CANAL COMPANY.

(1865) 6 B. & S. 631.

The Bradford Canal Company was empowered by statute to make a canal and supply it with water from certain streams and to make reservoirs and do all things necessary for the navigation of the canal. The water taken to supply the canal was at first pure, but owing to the growth of the town of Bradford it became so foul and polluted that the canal became a public nuisance. The Company demised the canal in this state. *Held*, that their lessees were liable to an indictment for nuisance.

Crompton, J.—The indictment charges the defendants with a public nuisance by collecting and keeping exposed in their canal foul and polluted water. It is clear that they did take and collect the water of the Bradford Beck and bring it into the head of their canal, so that filth and mud were collected there and an undoubted nuisance caused. The foul water was more stagnant in the canal than it would have been in the beck, and the defendants are liable unless they are authorized

by some statute to create this nuisance. The lessees may justify as the Company might under the powers of the Act of Parliament. But is there any provision in the Act that the Company may commit a nuisance? Whether an authority is given or duty imposed depends on the intention of the Legislature. Here the Company are authorized to take the water of certain becks and make a canal; but that does not involve their bringing feculent matter and allowing it to accumulate in their canal so as to be a nuisance.

BLACKBURN, J.—There is no precise authority in point; and we must have recourse to the general principle of law. Persons who maintain their property so as to be a public nuisance are indictable; and the question in the present case, which concerns the occupiers, the lessees of the canal, is whether, they having maintained and kept part of it in such a state as to be a public nuisance, there is anything which prevents them from being indictable? The answer is that they had the right to take the water from the Bradford Beck (there is no distinction between it and the others), which in its natural state was pure, and that it had become foul by filth poured into it from the drains of persons living in the neighbourhood, so that the defendants, taking it in that condition, caused this nuisance. If they were enjoined by Act of Parliament to take the water of the beck, and others had converted it into a sewer and it was impracticable to separate the foul parts, the present case would be within *R.* v. *Pease* (*a*). Then the defendants would have a good answer to the indictment. **But assuming that the defendants take the water under the direction of the Legislature, these enactments are only permissive;** the defendants are not authorized or enjoined to take water in such a state as to make the canal a nuisance. Inconvenience to the public and to the Company may be occasioned if, from the want of pure water, the supply of water in the canal runs short, but that can afford no justification for the defendants creating a nuisance.

SHEE, J.—*R.* v. *Pease* is distinguishable: there the Act of Parliament **authorized** the nuisance, viz. the use of locomotive steam-engines in the way and the place in which and where

(*a*) 4 B. & Ad. 30.

their use was a nuisance. But if a new mode of using locomotive engines had been afterwards discovered, producing effects different and much more injurious to the public than the effect of engines constructed and worked at the time when the Act passed, that would be a nuisance not within the contemplation of the Legislature, and not authorized by the Act.

168.

R. v. CARLILE.

(1834) 6 C. & P. 636.

A Fleet Street bookseller was distrained on for refusing to pay church rates. In order to call attention to his grievances he exhibited in his window effigies representing the Devil, a Bishop, and a broker. In consequence of this display crowds gathered and obstructed the highway. *Held*, that he was indictable for a nuisance.

PARK, J.—The gravamen of a charge like this is . . . whether the defendant, by the exhibition of them [the effigies] at his windows, caused the footway of Fleet Street to be obstructed, so that the public could not pass as they ought to do; and the main question is, whether His Majesty's subjects have been annoyed in this respect. . . . The defendant says, that if his neighbour be injured he ought to bring his action. No doubt, if a man does an act which injures a particular neighbour he is not liable to be indicted if no one else but that neighbour be injured; but **if a place is situate near a highway and the defendant do that which causes the persons passing to be prevented from passing as they ought to do, and, besides this, people are annoyed in the occupation of their houses, this is a nuisance, for which the party is indictable.** It may be said that Mr. Gray, the coach proprietor, takes up passengers at his coach office; but if he does he must do it in a reasonable time; and Lord Ellenborough draws this very distinction, for he says in the case of *R.* v. *Cross* (*a*) a stage coach may set down and take up passengers in the street, this being necessary

(*a*) 3 Camp. 224.

for public convenience, but it must be done in a reasonable time. And in another case, *R.* v. *Jones* (*b*), Lord Ellenborough said: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance; a cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance." There is no doubt that a tradesman may expose his wares for sale; but he must do it in such a way as not by so doing to cause obstruction in the public streets. In the case of *R.* v. *Russell*, the party was merely exercising his lawful trade, and he used to let packages stand on the footpath. He was held indictable; but if he had merely carried his packages out he would not have been liable to have been prosecuted. In the case of *R.* v. *Cross* (*c*) Lord Ellenborough uses the words "unauthorized obstruction." Were not these figures unauthorized? . . . In the present case one question is, whether this act of the defendant was at all necessary for the *bonâ fide* carrying on of his trade; for if it was, and he did not take up more time in the doing of it than was necessary, the law would do what it could to protect him. Now the defendant is so far from thinking that this exhibition is essential to the carrying on of his trade, that he has told us to-day that he considers his trade to be injured by it. . . . **The defendant has asked whether he has not a right to do what he will on his own premises? No doubt he has, but he must not do anything there that injures his neighbours, so as to be a private nuisance, nor anything which annoys the public, which is a public nuisance.** . . . If this be a nuisance, the defendant ought to be convicted; and **if there were 500 other nuisances, they will not justify this** (*d*). The question

(*b*) 3 Camp. 230.
(*c*) 6 East 427.
(*d*) The defendant, who appeared in person, had attempted to justify himself by the allegation that the obstruction of the highway by persons

therefore really is, whether you think the defendant has, by the acts proved, caused an obstruction of the public highway to the nuisance of persons passing along that way, and to the persons residing in that neighbourhood.

169.

R. v. TRAIN.

(1862) 2 B. & S. 640.

The defendant without authority laid down in a London street a double line of tramways, which, owing to their construction, frightened horses and caused the wheels of vehicles crossing them to skid. *Held*, that this was a public nuisance, even though the tramways might be for the convenience of the public generally.

CROMPTON, J.—We are strongly of opinion that this conviction was right. . . . Our judgment proceeds on these short grounds. It was clearly shown by the evidence, and is established by the finding of the jury, that these tramways were a nuisance, dangerous and mischievous to passengers on the highway; and the defendants, by whom they were constructed, are therefore responsible for that nuisance, unless Mr. Bovill succeeds in establishing the proposition for which he contends. He tried to distinguish the present case from those which have settled the law that you cannot, for the benefit of one part of the public, interfere with the rights of passage of the rest over land or water. I understand him to admit that these tramways would be a nuisance to travellers passing across them, but he contended that, taking all the facts together, it was a question for the jury whether they were a nuisance, or whether what was done was not a reasonable and convenient arrangement for the use of the highway by the public generally. Supposing, however, for the present that his proposition that an arrangement for the use of a highway in a particular manner

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looking at displays in shop windows or at processions passing along the street was a matter of frequent occurrence.

being for the advantage of the public generally would be an answer to an indictment for that arrangement, this case does not come within that principle, seeing that this was not an arrangement for the ordinary use of the highway, and is very distinguishable from the cases he put. It may fairly be said, for instance, that the raising a portion of a highway for the use of passengers is allowable; but that is for the use of the highway *quâ* highway. And I do not say that there may not be cases where arrangements for the advantage of one class of persons may be allowable though mischievous to another class. But what has been done here is not making any arrangement for the use of the highway in the ordinary manner of using a highway. On the contrary, it is withdrawing so much of the highway from its ordinary use as such; for it is idle to say that you can use as an ordinary part of this highway the portion taken up by the tramways. A carriage meeting an omnibus running on one of them cannot give and take the road. The case is like that of *R.* v. *The United Kingdom Electric Telegraph Company Limited* (*a*), which we have just disposed of, and others of a similar nature. It also falls within *R.* v. *Longton Gas Company Limited* (*b*), with which we took a good deal of pains, where a gas company, without being authorized by a statute, opened trenches in the streets of a town for the purpose of laying down gas pipes, and this was adjudged a nuisance. **If persons wish for power to act as the defendants acted here, they must take the usual regular and constitutional course of getting the protection of the Legislature.**

Then was there any evidence to go to the jury that this was a proper use of the highway? I think not. It was put that these tramways would enable persons to pass conveniently from A. to B. So would a railway; but the defendants would clearly not be justified in making one in a highway without the authority of Parliament.

(*a*) 31 L. J. M. C. 166.
(*b*) 29 L. J. M. C. 118.

170.

R. v. NEIL.

(1826) 2 C. & P. 485.

N. was indicted for causing a nuisance by smells arising from carrying on the trade of a varnish maker at Islington. The defence was (1) that the smells were not injurious to health; (2) that there were many other smells in the neighbourhood and that, though the accumulation of all these smells was offensive, yet the defendant's alone would not have been so, and therefore was no nuisance.

ABBOTT, C.J.—It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough, as the neighbourhood has a right to pure and fresh air. It has been proved that a number of other offensive trades are carried on near the place . . . **but the presence of other nuisances will not justify any one of them;** or the more nuisances there are, the more fixed they would be; however, one is not the less subject to prosecution because others are culpable. The only question therefore is this: Is the business as carried on by the defendant productive of smells offensive to persons passing along the public highway?

171.

JENKS v. TURPIN.

(1884) 13 Q. B. D. 505.

By s. 4 of the Gaming Houses Act, 1854, it is provided that "Any person, being the owner or occupier or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein,—and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid,—and every person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid," may on summary conviction be adjudged to pay a penalty not exceeding £500.

A. was the occupier of premises used by a club, of which he was

the proprietor and received the profits. B., C., D., and E. were members of the committee of management. F., G. and H. were members of the club. Baccarat was played nightly, the bank being held by one or other of the members. *Held*, (i.) that the club was a common gaming house; (ii.) that baccarat is a game of chance and unlawful within the above section; (iii.) that to constitute unlawful gaming it is not necessary that the games played should be unlawful, it is sufficient that the play is in a common gaming house; (iv.) that A. could be convicted of keeping and using the premises for unlawful gaming; that B., C., D. and E. could be convicted as persons having the care or management, etc., but that F., G. and H. could not be convicted under the section.

Hawkins, J.—When all these facts are looked at, even with a most indulgent eye, it is impossible for any man in his senses to doubt that the house was really opened and kept for the purpose of gaming at the game of baccarat as its main and principal object, and not as a mere social club to which gambling even to a considerable extent was ancillary. I think it right, however, to add, that, if the house had been kept open for a double purpose, viz. as an honest social club for those who did not desire to play, as well as for the purpose of gaming for those who did, it would none the less be a house opened and kept "for the purpose of gaming."

The enactment, however, under which this conviction took place (17 & 18 Vict. c. 38, s. 4) is not directed against every person who keeps a house in which gaming takes place. It imposes a penalty only on those who open, keep, or use a house for the purpose of "unlawful" gaming being carried on therein, or permit others so to do, or who assist in the management of the business of such house.

This brings me to the first question submitted for our opinion, viz., whether the gaming for which this house was opened was *unlawful gaming*. In dealing with this question, I cannot help thinking that the learned magistrate has taken rather too narrow a view of the 4th section, in treating the question whether the gaming was unlawful as dependent upon whether the games played were *unlawful games*. The section makes no mention of unlawful games, nor does it in any way confine its operation to persons keeping houses for gaming at such games. It is directed generally against all persons keeping houses for the purpose of *unlawful gaming*. The illegality

of the *gaming* is what we have to look to, and not merely the illegality of the game. **Gaming may be unlawful by reason of the place in which it is carried on, or by reason of the unlawfulness of the game itself.** The common law did not prohibit the playing at dice and cards: 11 Co. Rep. 87; *Sherbon* v. *Colebach* (*a*): they were not unlawful games. But the keeping of a common gaming house was at common law an indictable offence: Hawk. P. C. book 1, c. 75, ss. 1, 6, "Bacon's Abridgment," *Nuisance* A., vol. 5, p. 178. Can anybody doubt that, at common law, if dice and cards were played in a common gaming house as part of the unlawful business thereof, such gaming would be unlawful, though the games in themselves were not so?

To me, therefore, it seems that, in order to determine whether the gaming was unlawful, two matters present themselves for consideration—first, was this house a common gaming house, in which all gaming was unlawful?—secondly, was it opened for the purpose of an unlawful game being played therein, so as to make that particular gaming unlawful? In considering the latter question, we have confined our attention to the game of baccarat, no other game played therein having been suggested to be an unlawful game.

First, was this house kept as a common gaming house so as to make it an indictable nuisance at common law? . . . After a careful consideration of the facts . . . I have come to the conclusion that there was an abundance of evidence that in all its essential characteristics the . . . club was a "common gaming house" and that as such the keeper of it might have been indicted as for a nuisance at common law. . . . It is true no annoying interference in the public street can be pointed to so that in that sense a public nuisance can be said to have been created; but that is not necessary: see *R.* v. *Rice and Another* (*b*). . . . Neither . . . do I think that it makes any difference that the use of the house and the gaming therein was limited to the subscribers and members of the club, and that it was not open to all persons who might be desirous of using the same. If this could be set up as a defence to an

(*a*) 2 Vent. 175. (*b*) 2 D. & R. 431.

indictment, any indictment for keeping a common gaming house might be defeated. To no gaming house is the public at large invited to go without restriction of some sort or another. The keeper of such a house has always the right to admit or refuse admission to anyone he pleases, or to make such rules as he may think fit for the regulation of such admission. . . .

I now proceed to discuss the question whether this house was kept for the purpose of unlawful gaming, in the sense of gaming at unlawful games—a somewhat difficult subject to deal with, because with few exceptions no games have been in so many words declared to be unlawful; and yet, in using the words "unlawful games," it is clear the Legislature intended them to cover and include some games which being lawful in themselves were only made unlawful when played in particular places or by particular persons. This I shall point out when I come to refer, as I must do, to the statutes cited in the course of the argument.

I have already stated that, at common law, the playing at any game was legal and permissible. . . .

No case was cited to us, nor have I been able to find any, in which a person was held punishable at common law in respect of gaming, except for a nuisance as the keeper of a common gaming house. We must take it therefore, I think, that at common law no game was in itself unlawful, and must look to the statutes alone to see what games are rendered unlawful by legislative enactments. . . .

[The learned Judge then referred at length to all the statutes in question before the Gaming Act, 1845, and continued:]

In this state the law (so far as relates to the immediate question before us) was when 8 & 9 Vict. c. 109 (1845) was passed. By that Act . . . it is enacted that so much of 33 Hen. 8, c. 9, whereby any game of *mere skill*, such as bowling, coyting, cloysh-coyts, half-bowl, tennis or the like, is declared an unlawful game, or which enacts any penalty for playing at any such game of skill as aforesaid, shall be repealed; and also so much of the said Act as makes it lawful for every master to license his servants . . . to play at cards, dice, or

tables, or any unlawful game, shall be repealed; and no such licence shall avail any person to exempt him from the danger or penalty of playing at any unlawful game, or in any common gaming house.

Nothing could more clearly indicate the intention of the Legislature to legalise to all persons and at all times mere games of skill, but to preserve in their integrity all the penalties which then attached to the playing at unlawful games anywhere, or gaming at all (even at lawful games) in common gaming houses, and to deprive every person of the power to license such playing or gaming.

The second section of the Gaming Act, 1845, defines what, in default of other evidence, shall be sufficient to prove a house to be a common gaming house. After reciting that doubts had arisen whether certain houses alleged or reputed to be opened for the use of the subscribers only, or not open to all persons desirous of using the same, are to be deemed common gaming houses, it is declared and enacted that "**in default of other evidence proving any house or place to be a common gaming house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake, play, or bet**; and every such house or place shall be deemed a common gaming house such as is contrary to law and forbidden to be kept by 33 Hen. 8."

I have cited at some length these various statutes, even where the provisions have been repealed, for the purpose of showing the general current of legislation against gaming houses, and making more intelligible what I am about to say upon the question as to what are "unlawful games" within the meaning of the statutes. I divide them into two classes—first, those which are absolutely forbidden by name, and to

the gaming at which a penalty is attached. This class includes ace of hearts, pharaoh (or faro), basset and hazard, made illegal by 12 Geo. 2. c. 28, passage, and every other game with a die or dice, except backgammon, made illegal by 13 Geo. 2. c. 19; roulet (or roly poly) made illegal by 13 Geo. 2. c. 34. The second class comprises a number of games not altogether prohibited under penal consequences, nor declared to be altogether illegal, but which, nevertheless, have been styled "unlawful" by the Legislature, because the keeping of houses for playing them and the playing them therein by anybody were rendered illegal.

Now the games thus treated as unlawful by 33 Hen. 8, c. 9, are bowling, coyting, cloysh-coyts, half-bowl, dicing, tennis, and carding, or any other manner of game prohibited by any statute thereafter made, or any unlawful new game then invented or made, or any other unlawful game thereafter to be invented, found, had, or made. As to bowling, coyting, cloysh-coyts, half-bowl and tennis—these seem to have been games of mere skill; and . . . the statute of 33 Hen. 8, c. 9, was repealed as to them and all other like games of skill by 8 & 9 Vict. c. 109, s. 1. Since that statute the only games made unlawful by 33 Hen. 8, c. 9, are games of dice or cards, whether such games were known at the time of the passing of that statute or have since been invented. All such games, if they are games of chance, or games of chance and skill combined (which cannot be called games of *mere* skill) are in my opinion clearly within the meaning of the words "unlawful games" in 17 & 18 Vict. c. 38. . . .

The unlawful games then, now are,—ace of hearts, pharaoh, basset, hazard, passage, roulet, every game of dice except backgammon, and every game of cards which is not a game of mere skill; and I incline to add, any other game of mere chance.

Does baccarat come within this category? [The learned Judge gave his reasons for holding that it did and continued—]

Being satisfied that Mr. Jenks was the occupier of the house, that he opened and kept it for the purpose of gaming at, amongst other games, baccarat, and that baccarat is an

unlawful game within the meaning of the statute, I am of opinion that he was properly convicted under s. 4 of 17 & 18 Vict. c. 38, of opening and keeping a house for the purpose of unlawful gaming: and, having regard to what I have already said as to the house being a common gaming house, I am of opinion that the conviction may also be supported upon the ground that all gaming therein, even at lawful games, was unlawful gaming. I have now disposed of the case so far as regards Mr. Jenks.

As regards the four members of the committee of management, Mr. Wilkinson, Sir Charles Cunningham, Mr. Franklin, and Mr. Phillips, having decided that the house was opened and kept for unlawful gaming, the only remaining question is, whether these appellants "had the care or management of or in any manner assisted in conducting the business thereof."

I am of opinion that they did undertake and had such care and management, and did so assist in conducting the business of the house. It is impossible to doubt that they were cognizant of the rules and regulations of the club, and of its true character. The second rule expressly places the internal arrangement of the club under the management of the committee. The committee elect the members: they have power to make by-laws for its regulation; and, above all, they exercised an authority with reference to this very game of baccarat, to allow it to be played or to suspend the game pending the proceedings before the magistrate. I think there was abundance of evidence to warrant their conviction.

And now, lastly, as to the players, Messrs. Fitch, Nesbit, and Haynes. I do not find any evidence that they did more than play baccarat in the house. By so doing, it may be that they to some extent enhanced the profits of the house; but it does not show that they took any part in the care or management of it. A customer who buys an article at a shop might just as well be said to assist in conducting the business of the shop. The law does not make it an offence to add to the profits of a gaming establishment; it requires that there should be assistance in conducting the establishment. Whenever the Legislature has intended to impose a penalty upon a mere

player at an unlawful game, there has been an express enactment to that effect: see 33 Hen. 8. c. 9, s. 12; 16 Car. 2. c. 7, s. 3; 9 Anne, c. 14, s. 5; 12 Geo. 2. c. 28, s. 3; 13 Geo. 2. c. 19, s. 9; 18 Geo. 2. c. 34, s. 2; etc.

172.

PEERS v. CALDWELL.
TAYLOR v. CALDWELL.

[1916] 1 K. B. 371.

The appellant Peers was the owner of two automatic machines which were kept by him at a small confectionery shop occupied by the appellant Taylor. The shop was visited by a large number of persons, mostly youths and young boys, for the purpose of playing with those machines. The player placed in the slot of the machine a halfpenny and then by means of a handle released a ball which fell down through a number of pins; under the pins was a cap which the player controlled by another handle; if he could catch the ball in this cap he received from the machine a check which he could exchange in the shop for sweets. *Held*, that there was evidence on which the magistrate could find that the appellants were using these premises for the purpose of money being received as the consideration for a promise to give thereafter a valuable thing on an event relating to a game and that they had committed an offence against s. 1 of the Betting Act, 1853 (*a*).

Ridley, J.—In this case we have to decide whether the magistrate came to a right conclusion in convicting the appel-

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(*a*) By s. 1 of the Betting Act, 1853, it is provided that "No house, office, room or other place shall be opened, kept, or used for the purpose of the owner, occupier or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing in any event or contingency of or relating to any horse race, or other race, fight, game, sport or exercise."

By s. 3, "Any person who, being the owner or occupier of any house, etc., or a person using the same, shall open, keep or use the same for the purposes hereinbefore mentioned, or either of them; and any person who,

lants of offences under s. 1 of the Betting Act, 1853. The case against the appellant Peers was that he, being a person using a shop at No. 38, Oldhall Street, in the city of Liverpool, knowingly permitted the same to be used for the purpose of money being received on his behalf as the consideration for an undertaking to give thereafter a certain valuable thing on a contingency relating to a game, contrary to the section. The appellant Taylor was charged with the same offence as occupier of the premises. [His Lordship described the method of playing the game, and continued:] Upon the facts, as set out in the Case, the first question which arises is whether the game is one of skill or chance. The magistrate, acting on the decision in *Pessers* v. *Catt* (*b*), held as a matter of law that he was bound to hold that it was a game of skill and not of chance. He also found that it was immaterial whether the game was one of skill or chance, and convicted the appellants, one as occupier and the other as user of the premises. I think the magistrate was wrong in holding that he was bound to hold it was a game of skill. It is a pure question of fact in each case, and it is open to a magistrate to find either way. That has been decided in *Bracchi* v. *Rees* (*c*). I shall assume, for the purposes of the argument, that it was a game of skill; and then the question arises whether on that assumption what took place between the boys who played at this game, on the one hand, and the appellants on the other, amounted to an offence under the second part of s. 1 of the Act. I think we must not be misled by a consideration of the strict meaning of the word "betting." That word, although used in the first part of the section, does not appear in the second part, under which these proceedings were taken. The preamble to the Act indicates a desire on the part of the Legislature to suppress betting houses, but the first part of the section deals with

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being the owner or occupier of any house, etc., shall knowingly and wilfully permit the same to be opened, etc., by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, etc., opened, etc., for the purposes aforesaid, or either of them, shall on summary conviction" be liable to a penalty.

(*b*) 77 J. P. 429.

(*c*) 84 L. J. K B. 2022.

betting *eo nomine*—the keeping of houses for the purpose of "betting with persons resorting thereto"; while the second deals with the keeping of houses for the purpose of receiving money paid in advance, not necessarily in connection with betting in the ordinary sense of the word, but as and for the consideration of an undertaking to pay thereafter money or money's worth on a contingency of a kind therein specified. The distinction was pointed out by Lord Coleridge, C.J., in *Bond* v. *Plumb* (*d*). It is important to bear this distinction in mind. It seems to me that, when the boys put their money into the receptacle in the machine and took their chance of getting two-pennyworth of sweets, the case comes exactly within this second part of the section. The case of *Fielding* v. *Turner* (*e*) was decided upon the use of an automatic machine very similar to this. In that case Lord Alverstone C.J., said, "The keeper or owner of any such machine backs his chance against the person who uses it." I think that is the proper way of regarding the transaction which took place here. Its position may be described in this way—that the appellants on the one hand backed their chances against those of the boys on the other that the boys would not catch the ball in the cap. There we have before us a simple case of what I will call a wager. The fact that there is a possibility of exhibiting some degree of skill does not, in my view, alter the liability of the appellants. I can easily understand that a game may be one of skill whilst the player only thinks of it as a matter of chance. In my view the boys were not exercising skill; they were regarding only the sweets. The conviction must be affirmed.

Avory, J.—I am of the same opinion. For the purposes of my judgment I will assume that this machine was a game of skill, which means, as I understand, a game which affords scope for skill as distinguished from mere chance. It must, however, be borne in mind that to call a game a game of skill does not make it a game of skill in the sense that everybody who takes part in the game plays with skill. . . . I think it

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(*d*) [1894] 1 Q. B. 169.
(*e*) 72 L. J. K. B. 542; [1903] 1 K. B. 867.

important to bear that in mind when we consider what it was the magistrate had to decide. It was proved before him that, in the course of twelve minutes on one day, seventeen boys used this machine twenty-seven times between them, so that there was very little time for the exercise of skill, and, according to the evidence, the players were on an average successful only once in every eight times. The magistrate had to decide whether the user of the machine brought the appellants within the second part of s. 1 of the Betting Act, 1853. That section has been held to apply to two different kinds of transactions. The first part of the section applies to a person who keeps an office for the purpose of betting, either on credit or for ready money, with persons resorting to the office: the second part of the section deals with persons keeping an office for the purpose of what is known as "ready-money betting" —that is, for the receipt of money in advance as the customer's stake, for which purpose a resorting to the office is not necessary. Although that elliptical expression "ready-money betting" has been applied to the second part of the section, I think it is important to remember that the Legislature omitted in that part the word "betting," and substituted much wider words in order apparently to cover cases as to which there might be a question whether they amounted to betting in the ordinary sense of the term or not. What we have to consider is whether in this case there was any evidence upon which the magistrate might find that the appellants were keeping or using these premises for the purpose of money being received as the consideration for any promise, express or implied, to give thereafter a valuable thing on an event relating to a game. I think the test of skill or chance is not the test to be applied for the decision of this particular case. I agree with counsel for the appellant that the test is, What was the consideration for the halfpenny? If the money was paid by the boys as entrance fees for the purpose of enabling them to take part in a game of skill, the transaction would not constitute an offence under the second part of the section. On the other hand, it is clear that if the consideration for the payment of the halfpenny was solely the promise of the appellants to give the player two-pennyworth of sweets if the ball

fell into the clown's cap, the transaction would constitute such an offence. In my view, under the circumstances, it was clearly open to the magistrate, notwithstanding that he came to the conclusion that he was bound by the decision of the Court of Appeal to hold that it was a game of skill, to come also to the conclusion that the halfpence were not paid as entrance fees, but that the sole consideration for the payment thereof was the promise of the sweets on the ball falling into the clown's cap. For this reason I read the finding of the magistrate, where he says that it was immaterial whether the game was one of chance or skill, because the appellants had contravened the section of the Act, as meaning this—that the boys were not paying their halfpennies for the privilege of competing at a game of skill, but were simply gambling on the chance of getting two-pennyworth of sweets. That is my own personal view, and, in my opinion, the magistrate was right in convicting, and this appeal must be dismissed.

173.

BROWN v. PATCH.

[1899] 1 Q. B. 892.

Patch, who was a bookmaker, entered enclosed grounds in which horse races were being carried on, and put up a bamboo structure about five or six feet high, supported on four legs. On the top was a board on which was painted "Bob Patch, London. All in run or not—pay first past the post." On this board the odds against the different horses were written before each race. Patch stood on a box near this structure and carried on his business. *Held*, that he had used a "place for the purpose of betting with persons resorting thereto" within the meaning of s. 1 of the Betting Act, 1853.

CHANNELL, J.—The law has now been fairly well settled by the decision of the House of Lords in the *Kempton Park Case* (*a*). I think there is no difficulty in understanding what is the law and what is the interpretation of the statute; but

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(*a*) [1899] A. C. 143.

there is considerable difficulty in applying it in particular cases. **The statute seems clearly to be directed against betting places, not against betting persons.** Clearly, also, it does not forbid persons using a place by going there and meeting and betting with each other. Nor does it forbid keeping a place where persons may meet and bet with each other. Nor does it forbid carrying on the business of betting with anyone who will bet with you. But **it does forbid carrying on the business of keeping an office or place to which people may come and bet with you.** The judgments in the case in the House of Lords clearly show that that is the matter to be considered. The important question is not so much, what is a place? but what is the character of the user of it? and although the words used are "house, office, room, or other place," and it is clear that, according to the ordinary rule, "place" must be something *ejusdem generis* with "house, office, room," yet the analogy is with respect to the way the place is used rather than with respect to the way in which it is constructed. I think those propositions are clearly brought out in the judgments delivered in the House of Lords, and especially in the passages in the judgments of the Lord Chancellor and of Lord James of Hereford to which my brother Darling has referred. If a man, as was done here, uses certain apparatus with his name on it, and a statement of the odds he is prepared to lay, that apparatus may be used only to indicate his identity, and that he is willing to bet with anybody who will bet with him. If the apparatus is used for those purposes only, it does not in any way localise his business of betting, or bring him within the provision of the Act. But if it be used to indicate the **place at which there is a man to be found** who will bet with anyone who will come and bet with him **there**, then that apparatus becomes an extremely important and valuable matter to consider. In each case the facts must be looked at, to see whether the bamboo stage or the umbrella, or whatever it is that the man has got, is being used by him merely to indicate that he is prepared to bet with anybody who will bet with him, or whether he is using it to indicate that there is a **place at**

which the business of betting is carried on by him, and to which, therefore, people can go for the purpose of betting with him. With respect to the decisions which have been cited to us, the question in each case being, what is the proper inference to be drawn from the particular facts? although it is useful and valuable to see what inferences learned judges have drawn from particular facts in cases which have come before them, their decisions are not quite like binding decisions on a point of law. The question, after all, is a question of fact in each case—whether you come to the conclusion that there has been a user of a place, analogous to the user of a place like a betting office, at which the person who keeps or uses that place is prepared to bet with people who come there and bet with him. In the present case I think the facts are sufficient to bring it within the statute, and that the inference ought to be drawn that what the respondent did was not merely indicating that he was using that place as a place where he could be found and was carrying on his business. **He was localizing his business there,** with the object of attracting people there, and to prevent them from having to look for him all over the grounds. If that inference be drawn, this case is clearly brought within the principle of the decisions which have been held by the House of Lords to be good. Guided very considerably, of course, by the views taken by the Judges who decided *Shaw* v. *Morley* (*b*) and *Bows* v. *Fenwick* (*c*) I come to the conclusion upon the facts of this case that the inference ought to be drawn that the respondent's business was localized, and that consequently he was brought within the terms of the statute. Upon these grounds I am of opinion that the magistrates ought to have convicted, and that the case should be sent back with a direction that they ought to convict.

(*b*) L. R. 3 Ex. 137.
(*c*) L. R. 9 C. P. 339.

174.

JACKSON v. ROTH AND OTHERS.

[1919] 88 L. J. K. B. 397.

The respondents, who were members of a club, were charged with numerous offences against ss. 1 and 3 of the Betting Act, 1853 (*a*). The evidence was that certain members of the club carried on the business of bookmakers in a particular part of the club premises *Held*, that the fact that the club was a *bonâ fide* club and that the persons betting were all members of the club was no defence.

Avory, J.—Clearly the magistrate has taken the view that this case is governed by the decision of this Court in *Downes* v. *Johnson* (*b*), and if he is wrong the case must go back to him to adjudicate on the merits. I desire at once to point out the reason why I think the magistrate was wrong in saying that this case is governed by *Downes* v. *Johnson*. In *Downes* v. *Johnson* there was an express finding of fact (*b*) that "The club room was used exclusively by members. Individual members had no prescribed places or 'pitches' in such club room, and there was no member who could be accurately described as holding 'a bag against all comers.'" That expression, I apprehend, meant that there was no evidence that any person was carrying on the ordinary business of a bookmaker, prepared to lay odds against any horse with any member of the club who chose to back it. It goes on: "Certain of the members of the club usually laid odds against horses running in horse-races, and certain others of the members usually backed horses so running, but frequently their respective positions were reversed, when the layers became backers and *vice versâ*." On those facts it was impossible to argue that the business of a bookmaker—that is to say, a betting business as it is understood—was being carried on on those premises, and the findings of fact were perfectly consistent with its being merely a case of betting between members of a club, some of whom backed a horse while others laid against it, the position being occasionally reversed. There was no evidence that any particular member occupied any

(*a*) See note (*a*), *ante*, p. 318.
(*b*) 64 L. J. M. C. 238; [1895] 2 Q. B. at p. 204.

particular part of the room to which other members might resort with the hope of finding him, and the result was that the case was left for judgment on the footing that there was a club on the premises of which members were in the habit of betting with each other. The judgment, therefore, can only be regarded as a judgment to the effect that it is not an offence against the Betting Act, 1853, for members of a club to bet with each other on the premises of the club, and if they do that neither they nor the proprietor nor the occupier of the premises is liable under the Betting Act, 1853, for any offence. But that is not the present case. In all its essential details the present case is different, because you have here undisputed evidence that certain members of this club were carrying on the business of bookmakers in a particular part of the premises, and that individual bookmakers were carrying on their business at certain definite places in that room, which was fitted with all the paraphernalia necessary for carrying on a betting business. That seems to me not only to differentiate the case from *Downes* v. *Johnson*, but also to bring it distinctly within the authority of all those cases that have been cited, the most favourable of which to the respondents is *Powell* v. *Kempton Park Racecourse Co.*, from which passages have been read from the judgment of Lord Halsbury, L.C. The guiding principle of that judgment, as far as it affects the present case, is where he says (*c*): "I think it is clear that what the statute is dealing with here is the case of persons who are in control and occupation of the place which is assumed to be the betting establishment. The conducting of the business, whether as master or servant, is the thing made unlawful, and the business is that of a betting house or place to which people can resort for the purpose of betting, not with each other, but with the betting establishment." In my opinion, there was clear evidence here of a betting establishment on these premises, consisting of the bookmakers as distinguished from the members who were merely backing, and that the other members of the club who resorted there did so to bet with that betting establishment.

(*c*) 68 L. J. Q. B. at p. 397; [1899] A. C. at p. 159.

I suppose it can hardly be doubted that if a bookmaker chose to open premises as a club, he being the proprietor, and carried on his business as a bookmaker with the other members of the club, whom he himself elected, he would be using the place for purposes prohibited by the statute. Would it make any difference if there were two in partnership who opened such premises and called it a club? Or half a dozen? Or twenty? In the *Kempton Park Case* Lord James of Hereford, after dealing with what would constitute a "place," which there is no need to discuss here, because there is ample evidence that this particular room was a "place" within the meaning of the Act, said (*d*): "I do not find that the defendants [the Racecourse Company] have opened, kept, or used this enclosure for the purposes of betting more than any other portion of the racecourse. Any member of the public can enter it for the purpose of seeing the race. No facilities for betting are provided by the defendants, and the fact that bets are made therein results from the personal action of the persons entering it." In the present case all the facilities for betting were provided, and the fact that bets were made resulted from the attraction which those facilities for betting offered. I think, therefore, that the *Kempton Park Case* is not an authority in favour of the defendants, but supports the view which I have already expressed, which is the correct view of the law, and which certainly is quite consistent with the view expressed in *Downes* v. *Johnson*.

The magistrate also seems to have thought that as the bets were made between members of a *bonâ fide* club, those members could not be said to be persons resorting to the premises. I suppose he meant that they could not be said to be betting with persons resorting to the premises. That difficulty appears to me to be conclusively met by the decision of the Court of Criminal Appeal in *Rex* v. *Corrie*, which was a case of betting carried on on club premises, and it appeared that the members were divided into two classes, the defendants being the members laying the odds, and the other members betting with them. Lord Alverstone, C.J., said (*e*):

(*d*) 68 L. J. Q. B. at p. 416; [1899] A. C. at p. 195.
(*e*) 68 J. P. at p. 297.

"If this had been a case of members of a club resorting to the club for the purpose of betting one with another, I am of opinion that there would have been no case to go to the jury. But here there is some substantial evidence that the members of the club were not betting with one another, but were divided into two classes, Corrie and Watson being the bookmakers and the others going there to bet with them. On many occasions Corrie and Watson occupied the same places, sat at the same table, and used the tape list. There also seems to be some evidence of a habit of Corrie's of laying the odds, as distinguished from the other members of the club. . . ." My brother Darling said in his judgment that the answers to the questions in that case disposed of the judgment of Wright, J., in *Downes* v. *Johnson*. The club was formed for two purposes: first, social; and, secondly, a place where one could bet. That is exactly the case here. This club is formed for two purposes—one, social; two, for certain of the members carrying on the business of betting and carrying on, I think, a betting establishment. For these reasons I am of opinion there was ample *primâ facie* evidence that the offence was being committed by one or more of the respondents, and therefore, the case must be remitted to the magistrate.

175.

R. v. PRICE.

(1884) 12 Q. B. D. 247.

Charge of Stephen, J., to the grand jury. [The facts appear from the charge.]

Stephen, J.—One of the cases to be brought before you is so singular in its character, and involves a legal question of so much novelty and of such general interest, that I propose to state at some length what I believe to be the law upon the matter. I have given it all the consideration I could, and I am permitted to say that, although I am alone responsible for what I am about to say to you, Lord Justice Fry takes the same view of the subject as I do, and for the same reasons.

William Price is charged with a misdemeanour under the following circumstances: He had in his house a child five months old, of which he is said to have been the father. The child died and Price, as it seems, did not register its death. The coroner accordingly gave him notice on Saturday, January 12, 1884, that unless he sent a medical certificate of the cause of the child's death he would hold an inquest on the body on the following Monday. Price on the Monday afternoon took the body of the child to a field of his own, some distance from the town of Llantrissant, put it into a ten-gallon cask of petroleum and set the petroleum on fire. A crowd collected, the body of the child which was burning was covered with earth, and the flames extinguished, and Price was brought before the magistrates and committed for trial. He will be indicted before you on a charge which in different forms imputes to him as criminal two parts of what he is said to have done. Namely, first, his having prevented the holding of an inquest on the body; and, secondly, his having attempted to burn the child's body.

With respect to the prevention of the inquest the law is, that it is a misdemeanour to prevent the holding of an inquest which ought to be held by disposing of the body. It is essential to this offence that the inquest which it is proposed to hold is one which ought to be held. The coroner has not an absolute right to hold inquests in every case in which he chooses to do so. It would be intolerable if he had power to intrude without adequate cause upon the privacy of a family in distress and to interfere with their arrangements for a funeral. Nothing can justify such interference except a reasonable suspicion that there may have been something peculiar in the death, that it may have been due to other causes than common illness. In such cases the coroner not only may, but ought to hold an inquest, and to prevent him from doing so by disposing of the body in any way—for an inquest must be held on the view of the body—is a misdemeanour. The depositions in the present case do not very clearly show why the coroner considered an inquest necessary. If you think that the conduct of Price was such as to give the coroner fair grounds for

holding one, you ought to find a true bill, for beyond all question Price did as much as in him lay to dispose of the body in such a manner as to make an inquest impossible.

The other fact charged as criminal is the attempt made by Price to burn the child's body, and this raises, in a form which makes it my duty to direct you upon it, a question which has been several times discussed and has attracted some public attention, though so far as I know no legal decision upon it has ever been given, the question, namely, whether it is a misdemeanour at common law to burn a dead body instead of burying it. . . .

The question arises in the present case in a perfectly clear and simple form, unembarrassed by any such consideration as applied to the other cases to which I have referred. There is no question here of the illegality and dishonesty which marked the conduct of those who were described as resurrection men, nor of the artifices, not indeed criminal but certainly disingenuous, by which possession of the body was obtained in the cases of *R.* v. *Sharpe* (*a*) and *Williams* v. *Williams* (*b*). Price had lawful possession of the child's body, and it was not only his right, but his duty, to dispose of it by burying or in any other manner not in itself illegal. Hence I must consider the question, whether to burn a dead body instead of burying it is in itself an illegal act.

After full consideration, I am of opinion that a person who burns instead of burying a dead body does not commit a criminal act, unless he does it in such a manner as to amount to a public nuisance at common law. My reason for this opinion is that upon the fullest examination of the authorities, I have, as the preceding review of them shows, been unable to discover any authority for the proposition that it is a misdemeanour to burn a dead body, and in the absence of such authority I feel that I have no right to declare it to be one.

There are some instances, no doubt, in which courts of justice have declared acts to be misdemeanours which had never previously been decided to be so, but I think it will be found that in every such case the act involved great public

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(*a*) 20 Ch. D. 659. (*b*) 1 D. & B. 160.

mischief or moral scandal. It is not my place to offer any opinion on the comparative merits of burning and burying corpses, but before I could hold that it must be a misdemeanour to burn a dead body, I must be satisfied not only that some people, or even that many people, object to the practice, but that it is, on plain, undeniable grounds, highly mischievous or grossly scandalous. Even then I should pause long before I held it to be a misdemeanour, for many acts involving the grossest indecency and grave public mischief—incest for instance, and where there is no conspiracy, seduction, or adultery—are not misdemeanours, but I cannot take even the first step. Sir Thomas Browne finishes his famous essay on Urn Burial with a quotation from Lucan, which, in eight words, seems to sum up the matter: "*Tabesne cadaver solvat an rogus haud refert.*" Whether decay or fire consumes corpses matters not. The difference between the two processes is only that one is quick, the other slow. Each is so horrible that every healthy imagination would turn away from its details. . . . There are no doubt religious convictions and feelings connected with the subject which everyone would wish to treat with respect and tenderness, and I suppose there is no doubt that, as a matter of historical fact, the disuse of burning bodies was due to the force of those sentiments. I do not think, however, that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanour at common law. The statement of such a proposition, in plain words, is a sufficient refutation of it, but nothing short of this will support the conclusion that to burn a dead body must be a misdemeanour. As for the public interest in the matter, burning, on the one hand, effectually prevents the bodies of the dead from poisoning the living. On the other hand, it might no doubt destroy the evidence of crime. These, however, are matters for the Legislature and not for me. It may be that it would be well for Parliament to regulate or to forbid the burning of bodies, but the great leading rule of criminal law is that nothing is a crime unless it is plainly forbidden by law. This rule is no doubt subject to exceptions,

but they are rare, narrow, and to be admitted with the greatest reluctance, and only upon the strongest reasons.

This brings me to the last observation I have to make. Though I think that to burn a dead body decently and inoffensively is not criminal, it is obvious that if it is done in such a manner as to be offensive to others it is a nuisance of an aggravated kind. A common nuisance is an act which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all her Majesty's subjects. To burn a dead body in such a place and such a manner as to annoy persons passing along public roads or other places where they have a right to go is beyond all doubt a nuisance, as nothing more offensive both to sight and to smell can be imagined. The depositions in this case do not state very distinctly the nature and situation of the place where this act was done, but if you think upon inquiry that there is evidence of its having been done in such a situation and manner as to be offensive to any considerable number of persons, you should find a true bill.

Note.—The burning of dead bodies is now governed by the Cremation Act, 1902, which provides penalties for any infringement of the regulations in the Act, and also provides that nothing therein contained shall authorise the creation or permission of a nuisance.

176.

R. v. BROWN.

(1870) L. R. 1 C. C. R. 244.

The body of the prisoner's child was found in a field used for grazing cattle near a wall four and a half feet high, which separated the field from a private yard at the back of a public-house. The prisoner did not live at the public-house, but, in order to throw the body into the field, entered the yard by a narrow passage from the street. There was no path across the field and the body could only have been seen by a person searching for it, or, as in fact had happened, by accident. The body was not in any way concealed otherwise than by its situation. *Held*, that there was evidence for the jury of a "secret disposition" of the body within s. 60 of the Offences against the Person Act, 1861.

Bovill, C.J.—The first question is whether there is any evidence of a "secret disposition" of the body within the statute 24 & 25 Vict. c. 100, s. 60. It seems to me that **what is a secret disposition must depend upon the circumstances of each particular case.** The most complete exposure of the body might be a concealment. As, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded place, where the body would not be likely to be found. There would in such a case be a secret disposition of the body, and the jury must say, in each case, whether or not the facts show that there has been such a disposition. In this case there was abundant evidence to go to the jury that the body had been disposed of secretly. The evidence of a secret disposition consisted in the situation in which the body was placed, and it was a question for the jury to say whether placing the body in such a situation was in fact a secret disposition of the body. It is easy to suggest cases where placing a body in a particular situation would undoubtedly be evidence of a secret disposition, as if a body were thrown down from a cliff to the seashore in a secluded place. If, however, the place were very much frequented, there might be no evidence of a secret disposition from such an act. There must no doubt be an intent to conceal the body, but here there is no question as to the intent.

177.

R. v. ANDERSON.

(1868) L. R. 1 C. C. R. 161.

An American citizen was indicted at the Central Criminal Court for murder on board a Nova Scotian ship registered in London and sailing under the British flag. At the time of the offence the vessel was within French territory, being 45 miles up the River Garonne; the river was at that place half a mile wide and the tide flowed beyond that place. *Held*, that the ship was within the Admiralty jurisdiction, and that the prisoner was rightly tried at the Central Criminal Court.

Bovill, C.J.—There is no doubt that the place where the offence was committed was within the territory of France,

and that **the prisoner** was therefore subject to the laws of France, which that nation might enforce if they thought fit; but at the same time he **was** also **within a British merchant vessel, on board that vessel as a part of the crew, and as such he must be taken to have been under the protection of the British law, and also amenable to its provisions.** It is said that the prisoner was an American citizen, but he had embarked by his own consent on board a British ship and was at the time a portion of its crew. There are many observations to be found in various writers to show that in some instances, though subject to American law as a citizen of America and to the law of France as being found within French territory, yet that he must also be considered as being within British jurisdiction as forming a part of the crew of a British vessel, upon the principle that **the jurisdiction of a country is preserved over its vessels, though they may be in ports or rivers belonging to another nation. . . .** When vessels go into a foreign port they must respect the laws of that nation to which the port belongs; but they must also respect the laws of the nation to which the vessel belongs. When our vessels go into foreign countries we have the right, even if we are not bound, to make such laws as to prevent disturbance in foreign ports, and it is the right of every nation, which sends ships to foreign countries, to make such laws and regulations. In the present case, if it were necessary to decide the question upon the Merchant Shipping Act, I should have no hesitation in saying that we have the power to legislate for those persons **who place themselves under allegiance to us by becoming a portion of a British crew,** and there would be no inconsistency in including foreigners in such legislation. What is the effect of the Merchant Shipping Act it is not necessary now to decide, and therefore I do not feel it necessary to enter into the question, for the common law of England, independently of the statute, is in my judgment sufficient to decide the case. Here the offence is committed on board a British vessel by one of her crew. If this offence had been committed upon the high seas, there could have been no doubt upon the question either

on principle or authority, and the offence then would have been committed clearly within the jurisdiction of the Admiralty, and therefore the Central Criminal Court would have stood in the same position as if the offence had been committed within its jurisdiction on land. Then, is the case different because the offence was committed when the vessel was lying in the Bordeaux river, in a broad part of it below all bridges, and at a point where the tide ebbs and flows, and where great ships lie and hover. What difference is there between such a place and the high sea? The cases that have been cited clearly show that the Admiralty has jurisdiction in such a place; if so, the case stands precisely the same as if the offence had been committed upon the high seas. On the whole, I have come clearly to the conclusion that the prisoner is amenable to British law, and that the conviction is right.

178.

R. v. LABOUCHERE.

(1884) 12 Q. B. D. 320.

A criminal information for libel can be granted only at the suit of persons who are in some public office or position, and not at the suit of private persons.

Lord Coleridge, C.J.—It is much too late to question the perfect legality of criminal informations. The 4 & 5 Wm. & Mary, c. 18, to which so much reference was made in the argument, is conclusive to show their legality. It was a statute passed to correct the abuse of them, and to fix the conditions on which for the future they were to be allowed; the statute either assuming that the Court had power to allow them, or conferring that power if it did not exist. But two years before the passing of this statute their legality had been denied in the case of Mr. Prynne (*a*) by Sir Francis

(*a*) 5 Mod. 549.

Winnington, who, in the course of a very learned argument, stated that Lord Hale himself had said that on argument they could not stand. Lord Holt decided however to the contrary, intimating that Lord Hale must have been speaking only against the abuse of them.

Without going through the list of cases since the days of Lord Holt it is certain that at times they have been granted by the Court under circumstances and for reasons which could hardly satisfy now the discretion of this Court. . . . But the general dissatisfaction with this state of things led in the time of Lord Denman and Lord Campbell to a much stricter practice in this Court in the granting of these informations. I am quite aware that *R.* v. *Gregory* (*b*), *R.* v. *Latimer* (*c*), and a few cases of this sort occurred during this period of time; but there can be no doubt that the cases were rare, except where some person in a public or official position was attacked in relation to such position, or where the attack was of so cruel and outrageous a sort as to make it, according to the view of Hawkins, a matter which interested the public and called for the interference of the Court as representing the public and charged with the defence of its interests.

So it was during the greater part of the time of Sir Alexander Cockburn; though towards the close of his life the practice of the Court became somewhat easier and laxer. I have, however, by the kindness of a learned friend been furnished with the reports of fifty cases of criminal information running over the years from 1860 to 1880 inclusive; and out of these fifty cases four only were cases of informations granted at the suit of persons who were not in some public office or position; and during that time there were repeated declarations by various members of the Court, not indeed that, as matter of law, the information would not be granted at the suit of private persons, but that the Court would, as a general rule, leave private persons to their private remedies. For example, in *R.* v. *Lord Winchelsea*, in 1865, Blackburn, J., says, **"this remedy had usually and probably been confined to cases of magistrates, ministers, public officers, and persons in a high**

(*b*) 8 A. & E. 907. (*c*) 15 Q. B. 1077.

position whose character was of such public importance as to require immediate vindication." The Lord Chief Justice (Sir Alexander Cockburn) adds, that **"the extraordinary intervention by means of a criminal information was a procedure of a high prerogative character reserved for cases of public importance."** . . . Again in 1877, in the matter of a gentleman named Middleton, in which the libel was very gross, the rule was refused, and I find Mellor, J., with the concurrence of Lush, J., saying this: "We must be chary of making the high jurisdiction of this Court a sort of substitute for the ordinary jurisdiction of the magistrates. The Court used to be far more strict in the exercise of its extraordinary jurisdiction in granting criminal informations than it has been perhaps in later times; but this is hardly a case for its exercise. It it not like the case of a serious imputation on a magistrate, a public officer like a town clerk for misconduct in his office." Again in 1878, in the case of an application on the part of the musical critic of *The Times* newspaper against the present defendant for imputing to the applicant personal corruption, the rule was refused by Mellor, J., and Huddleston, B., the Court saying that, "the libel was one which might well warrant an indictment or an action, but it did not follow that it was the fit subject of a criminal information. That was the exercise of the extraordinary jurisdiction of the Court which as a general rule was reserved for cases of libel upon persons in an official or judicial position, and filling some office or post which made it for the public interest necessary that such jurisdiction should be exercised for the refutation of the libellous charges made."

If we go back to principle, we find it well stated by Blackstone, Book IV., c. 23, p. 309: "The objects of the other species of informations filed by the master of the Crown Office upon the complaint or relation of a private subject are, *any gross and notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind* not peculiarly tending to disturb the Government (for those are left to the care of the Attorney-General), but *which on account of their magnitude or pernicious example, deserve the most public*

animadversion." And if the passage in Starkie be looked at, in which he defends the proceeding by way of criminal information, which he calls "a proceeding irreconcileable with the ordinary principles of jurisprudence on which the law of libel in England is founded," it will appear at once that that great writer would have met the application before us with a summary refusal, and as not at all within those considerations which, in spite of the anomaly of the proceeding, bring about a result far more beneficial than might have been expected.

179.

R. v. MILES.

(1890) 24 Q. B. D. 423.

Miles was convicted before a Court of summary jurisdiction for an assault, and the Court being of opinion that the offence was of so trifling a character that it was inexpedient to inflict any other than a nominal punishment, discharged him upon his giving security to be of good behaviour. Subsequently he was indicted for assault and battery upon an indictment the first four counts of which related to the same offence in respect of which the summary proceedings had been taken. *Held*, that he could not be convicted upon those counts of the indictment.

HAWKINS, J.—With regard to the common law defence relied on as an answer to this indictment, it is not strictly a plea of *autrefois convict* (except as to the fourth count, which charged a mere common assault), because the defendant had never previously been actually convicted of either of the offences in the form in which they are charged in the first three counts; but it was a defence grounded, as Blackburn, J., said in *Wemyss* v. *Hopkins* (*a*), "on the well-established rule at common law that **whenever a person has been convicted and punished for an offence by a Court of competent jurisdiction** *transit in rem judicatam*—**that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; other-**

(*a*) L. R. 10 Q. B. 378.

wise there might be two different punishments for the same offence." This rule of law so stated has never been doubted or qualified in any one of the numerous authorities which are to be found in the books upon the subject, though it has not always been found easy to apply the rule to the facts of particular cases under discussion. In the case cited (*Wemyss* v. *Hopkins*), where the appellant had been summarily convicted by justices under the Highway Act (5 & 6 Wm. IV., c. 50, s. 78) for an offence which, though charged as a mere offence against the Highway Act, amounted also to an assault in law, it was held that he could not afterwards be convicted upon the same facts of an assault under s. 42 of 24 & 25 Vict. c. 100. That was a case too clear to admit of a reasonable doubt, and is a good illustration of the general rule of law. The difficulties which have arisen in the application of the rule have most frequently occurred in cases where a conviction or acquittal for a simple offence has been set up as a bar to a subsequent charge against the same person in a more aggravated form, and the law, as deducible from the numerous cases to be found on the subject, seems to be this: that **where a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence, whether with or without circumstances of aggravation, and whether such circumstances of aggravation consist of the offence having been committed with malicious or wicked intent or by reason that the committal of the offence was followed by serious consequences.** In this respect the criminal law is in union with that which prevails in civil proceedings. Whoever heard of a new action prevailing after a verdict and judgment for damages for the same cause of action simply on the ground that the damages were insufficient, or that the conduct of the defendant was, since the verdict and judgment, discovered to be more malicious that it was deemed to be at the trial? Judgment recovered in a former action was always a good plea in bar. In *R.* v. *John Walker* (*b*) it was held by Colt-

(*b*) 2 M. & R. 446.

man, J., that a conviction for an assault by wounding before justices was a bar to an indictment for the same assault and wounding with felonious intent to maim, disable, and do grievous bodily harm. In *R.* v. *Staunton* (*c*) the prisoner was indicted for wounding with intent to murder. He had previously been convicted and punished summarily for a common assault founded upon the same facts. The jury found the prisoner guilty of a common assault. In answer to a question of Erle, J., why the previous conviction had not been pleaded, it was said there was a difficulty in pleading a conviction for an assault to a charge of felony, whereupon that learned judge said that, in his opinion, the conviction would, if pleaded, have been an estoppel to the judgment for the *felonious* assault, and, though not pleaded, he treated the charge as having been adjudicated upon. Ten years later the same point was decided in *R.* v. *Elrington* (*d*), where to an indictment for an assault and maliciously wounding and causing grievous bodily harm, etc., a plea that on the hearing of a charge for the same assault, treated as a common assault before justices, they had dismissed the complaint, was held to be a bar. The true ground on which these decisions were based seems to me to be that the summary conviction or dismissal of the charges in each case operated as an absolute bar to any future proceedings for or in respect of the same assault; and as the aggravating circumstances, unless coupled with the assault, amounted to no crime, there was nothing to support the indictment. No doubt it seems a little startling that conviction for a common assault accompanied by a shilling fine or a dismissal of the complaint as too trifling for any punishment, should afford an answer to a subsequent indictment for that same assault, upon conclusive evidence that it was accompanied by an intent to murder; but reason and good sense point out that, even at the risk of occasional miscarriages of justice, when once a criminal charge has been adjudicated upon by a Court having jurisdiction that adjudication ought to be final, and, after all, such miscarriages are

(*c*) 5 Cox C. C. 324.
(*d*) 1 B. & S. 688.

very rare. No system of judicature can be suggested in which occasionally failure to ensure complete justice may not arise. After the most solemn and careful trial of an indictment for murder, resulting in the acquittal of the person charged, it may happen that within a week the most cogent and conclusive proof of his guilt may come to light, or he may actually confess his crime. Yet his first acquittal is final. So with justices of the peace. After a summary conviction or dismissal of a charge upon which they have lawfully adjudicted, evidence may be discovered which would probably have induced them to come to an opposite conclusion. Yet, as in the case of an acquittal or conviction upon an indictment, their acquittal or conviction upon complaint within their jurisdiction is equally final, and their decisions upon matters within their jurisdiction cannot, as I have already shown, be altered by presenting the same charge in the shape of an indictment before a jury in an aggravated form. But it is not every summary conviction or acquittal for a common assault which will operate as a bar to an indictment for an offence in which that assault was an element. It could hardly be contended that a previous conviction for a common assault could be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. For the offence of murder consists in the felonious killing. So also of manslaughter, *R.* v. *Morris* (*e*). . . . It might be suggested that it may so happen that justices take a grievously erroneous view of the facts presented to them, and that by convicting of a common assault when the facts point to a serious felony, justice may be defeated and a great criminal may escape the punishment due to his crime. True it is that it may so happen; so it may that a judge or jury may take an erroneous view of facts presented to them. For this there is no remedy.

(*e*) L. R. 1 C. C. R. 90.

180.

R. v. MORRIS.

(1867) L. R. 1 C. C. R. 90.

Morris was convicted at Petty Sessions of an assault on Thomas Lymer and was sentenced to imprisonment. Subsequently Lymer died and Morris was indicted for manslaughter. *Held*, that the conviction of assault was neither at common law nor under s. 45 of the Offences against the Person Act, 1861, a bar to the indictment for manslaughter.

Byles, J.—I am of opinion that the prior conviction of the assault under the 24 & 25 Vict. c. 100, s. 45, affords no defence to the subsequent indictment for manslaughter, the death of the deceased having occurred after the conviction, but being a consequence of the assault. The form and the intention of the common law pleas of *autrefois convict* and *autrefois acquit* show that they apply only where there has been a **former judicial decision on the same accusation in substance, and where the question in dispute has been already decided.** There has, in the present case, been no judicial decision on the same accusation; and the whole question now in dispute could not have been decided, for, at the time of the hearing before the magistrates, whether the assault would amount to culpable homicide or not depended on the then future contingency whether it would cause death. The case of *R.* v. *Salir* (*a*) . . . if not precisely in point is nevertheless a strong authority for this view of the law. But reliance is placed on the words of the statute (24 & 25 Vict. c. 100, s. 45), "for the same cause." It is to be observed that **that statute does not say for the same act, but for the same cause.** The word "cause" may undoubtedly mean "act": but it is ambiguous; and it may also, and perhaps with greater propriety, be held to mean "cause for the accusation." **The cause for the present indictment comprehends more than the cause in the former summons before the magistrates,** for it comprehends the death of the party assaulted. It is, there-

(*a*) C. C. C. Sen. Pap. vol. 46, p. 84.

fore, at least in one sense, not the same cause. But, if these observations on the meaning of the word "cause" as used in the statute should appear to savour too much of refinement, and to be used in support of a forced construction, it must be remembered that it is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law. An additional reason in this case for following the common law is the mischief which would result from a different construction . . . a murderer, for example, by suffering or obtaining a previous conviction for an assault, might escape the due punishment of his crime.

181.

R. v. TONKS.

[1916] 83 L. J. K. B. 712.

The appellant and her husband were summarily convicted under s. 12 of the Children Act of 1908 of unlawfully and wilfully neglecting their children in a manner likely to cause them unnecessary suffering or injury to their health. A few days later one child died, and the appellant and her husband were charged with manslaughter and convicted. *Held*, that on the charge of manslaughter the conviction for wilful neglect would not establish a plea of *autrefois convict*.

Avory, J. (in the course of the argument).—**The true question in this case is whether the appellant was on the first trial in peril of being convicted of the same crime as that for which she was in peril of being convicted in the second proceedings. If she was in such peril a plea of autrefois convict in respect of that crime would be proved.**

Judgment of the Court of Criminal Appeal, delivered by:

Lord Reading, C.J.—On the main issue raised by the appeal the argument is that, by virtue of s. 12 (4) of the Children Act, 1908, it is open to the jury, on the trial of a person over sixteen years of age for the manslaughter of a child of whom he had the custody, charge, or care, to find the

accused guilty of the minor offence of wilful neglect of the child, although they do not find him guilty of manslaughter. That is to say, that when a person is charged with manslaughter the jury are not bound to return a verdict either of guilty of manslaughter or of acquittal, but that it is open to them to find that the accused has been guilty of wilful neglect of the child, although he has only been indicted for manslaughter. But counsel contends that the section must be read as meaning that the jury may find a verdict of the lesser offence of wilful neglect, although they may have come to the conclusion on the facts that the accused is guilty of manslaughter.

We cannot think that that is the true meaning of the section, or that it is giving a reasonable interpretation to its language. The sub-section was passed to enable the jury, upon an indictment for the manslaughter of a child, to find a verdict of wilful neglect if they think that the facts warrant it, notwithstanding that the only offence for which the prisoner stands indicted is manslaughter. Without this section the jury would have been bound to acquit the accused if they thought that the charge of manslaughter was not proved. Counsel for the appellant also referred us to sub-s. 3, but that does not assist his case. Sub-s. 3 simply means that a person may be charged with an offence under s. 12, notwithstanding the death of the child, in respect of whom the offence is alleged to have been committed. A case might arise in which a child might not die actually in consequence of neglect, but where neglect might nevertheless have been present. There is, therefore, no difficulty arising out of the provisions of the Children Act, 1908, in applying the well-known maxim of the common law, that a person shall not be put in peril twice for the same offence. It is urged that the appellant has been convicted twice for the same offence, but that argument leaves out of account the important fact of the death of the child, which occurred some days after the first conviction. On the first occasion it would have been impossible to have charged the appellant with manslaughter, because the death had not then occurred. When the death did occur and the indictment

for manslaughter was preferred, no difficulty really arose. Proper effect can be given to the provisions of sub-s. 4 of s. 12 by the Judge telling the jury that in the case before them they must come to a conclusion either that the accused is guilty of manslaughter or is not guilty. He did not do in this case what he would have done in a normal case under this section—namely, point out to the jury that it was open to them, if they thought right, to find the prisoner guilty only of the lesser offence, because of the special facts of the case. In our view it is wrong to say that a person indicted for the manslaughter of a child, whose death has occurred after the conviction of the same person for the wilful neglect of that child, is twice put upon his trial for the same offence.

182.

R. v. VOISIN.

[1918] 87 L. J. K. B. 874.

Interrogation of accused person by police. [The facts appear from the judgment.]

Judgment of the Court of Criminal Appeal, delivered by:

A. T. LAWRENCE, J.—The prisoner and a woman named Berthe Roche were indicted for the murder of Emilienne Gerard. A verdict of "Not guilty" was directed by the Judge in the case of Roche. The jury found the prisoner, Voisin, guilty of murder, and he was sentenced to death. He has appealed to this Court against his conviction on the grounds of misdirection and misreception of evidence. . . .

The alleged misreception of evidence relates to a paper writing containing the words "Bladie Belgiam." This was written by the appellant at the request of the police at a time while he was being detained at Bow Street. The trunk of the body of the deceased woman had been found contained in a parcel in Regent Square with a label containing these words on it. The police were making investigations, and they had

requested the appellant to go to Bow Street and to account for his movements at the supposed time of the murder. He had just made a statement which had been taken down in writing, and after he had done so he was asked whether he would have any objection to write down the two words "Bloody Belgian." He said, "Not at all," and then wrote them down as above. It was argued that that writing was inadmissible in evidence on the ground that it was obtained by the police without having first cautioned the appellant, and while he was in custody. A number of cases were called to our attention in which different views had been entertained by Judges as to when statements by prisoners should, and when they should not, be excluded from consideration by the jury. It is clear, and has been frequently held, that the duty of the Judge to exclude statements is one that must depend on the particular circumstances of each case. The general principle is admirably stated by Lord Sumner in his judgment in the Privy Council in *Ibrahim* v. *Reg.* (*a*). **"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." The point of that passage is that the statement must be a voluntary statement. Any statement which has been extorted by fear of prejudice or induced by hope of advantage held out by a person in authority is not admissible. As Lord Sumner points out, logically those considerations go to the value of the statement rather than to its admissibility.** The question as to whether the person has been duly cautioned before the statement was made is one of the circumstances which must be taken into consideration, but this is a circumstance on which the Judge should exercise his discretion. It cannot be said, as a matter of law, that the absence of a caution makes the statement inadmissible. It may tend to show that the person was not on his guard as to the importance of what he was

(*a*) 83 L. J. P. C., at p. 190; [1914] A. C. at p. 609.

saying or as to its bearing on some charge of which he has not been informed. In this case the appellant wrote these words quite voluntarily. The mere fact that the words were written at the request of police officers, or that he was being detained at Bow Street does not make the writing inadmissible in evidence. Those facts do not tend to change the character of handwriting, nor do they explain the resemblance between his handwriting and that on the label, or account for the same misspellings occurring in both. There was nothing in the nature of a "trap," or of the "manufacture of evidence." The identity of the deceased woman had not at this moment been established, and the police, though they were detaining the appellant in custody for enquiries, had not then decided to charge him with this crime; indeed, if the writing had turned out other than it did, and other circumstances had not subsequently transpired, it is certain that he, like others who were similarly detained, would have been discharged.

It is desirable in the interests of the community that investigations into crimes should not be cramped. The Court is of opinion that they would be most unduly cramped if it were to be held that a writing voluntarily made in the circumstances here proved was inadmissible in evidence.

We think an error has crept into Lord Sumner's judgment in *Ibrahim's Case* (*b*), where he is made to say that the actual decision in *R.* v. *Best* (*c*) "was that under the proviso of s. 4 of the Criminal Appeal Act, 1907 (7 Edw. 7. c. 23) the Court would not interfere. . . ." As reported in the Law Reports there is no allusion to the proviso of s. 4. We read that case as deciding that the mere fact that a statement is made in answer to a question put by a police constable is not in itself sufficient to make the statement inadmissible in law. It may be, and often is, a ground for the Judge in his discretion to exclude the evidence, but he should do so only if he thinks that the statement was not a voluntary one in the sense abovementioned, or was an unguarded answer made in circumstances that rendered it unreliable or unfair, for some reason,

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(*b*) 83 L. J. P. C. at p. 192; [1914] A. C. at pp. 612, 613.
(*c*) 78 L. J. K. B. 658; [1909] 1 K. B. 692.

to be allowed in evidence against the prisoner. Even if we disagreed with the mode in which the Judge had in this case exercised his discretion, which we do not, we should not be entitled to overrule his decision on appeal. This was evidence admissible in law, and it could not be fairly inferred from the other circumstances that it was not voluntary.

In 1912, the Judges, at the request of the Home Secretary, drew up some rules as guides for police officers (*d*). These rules have not the force of law. They are administrative directions the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the Judge presiding at the trial.

183.

R. v. BOND.

[1906] 75 L. J. K. B. 693.

The prisoner was indicted under s. 58 of the Offences against the Person Act, 1861, with feloniously using instruments upon a woman, who was his servant and who was pregnant by him, with intent to produce her miscarriage. The defence was that the instruments were used for a lawful purpose. To rebut this defence and to prove intent the evidence of another woman was tendered upon whom, nine

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(*d*) POLICE ENQUIRIES.

Memorandum by H.M. Judges of the King's Bench Division.

"1. When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons whether suspected or not from whom he thinks that useful information can be obtained.

"2. Whenever a police officer has made up his mind to charge a person with a crime he should first caution such person before asking any questions or any further questions as the case may be.

"3. Persons in custody should not be questioned without the usual caution being first administered.

"4. If the prisoner wishes to volunteer any statement the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words 'be given in evidence.'

"Alverstone, C.J. '

"October, 1912."

months earlier, the prisoner had used instruments in order to produce miscarriage. Her evidence contained a statement by the prisoner that he had "put dozens of girls right," and a statement by another servant of the prisoner that he had "put her right." *Held*, by the Court for Crown Cases Reserved, that this evidence was admissible on the ground that it tended to prove a systematic course of conduct on the part of the prisoner. *Held*, further (*per* Darling, J., Jelf, J., and A. T. Lawrence, J.), that it also tended to prove the intent with which the prisoner used the instruments.

KENNEDY, J.—In this case John Bond was charged with attempting to procure abortion by using instruments on the body of Ethel Annie Jones on October 20, 1905. The question for the decision of the Court for Crown Cases Reserved is as to the admissibility of the evidence of another woman, Gertrude Sandles Taylor, who was called as a witness to depose that the accused, nine months before, had been guilty of the same crime upon her, and who, in the course of her examination-in-chief, stated that he had then used language to her indicating that previously he had been guilty of the same crime in many other cases.

In my judgment, the question is one of great importance as affecting the fair trial of accused persons. **"It may be laid down as a general rule, that in criminal, as in civil cases, the evidence shall be confined to the point in issue"**—Roscoe's "Criminal Evidence" (12th ed.), pp. 78, 79. **"Where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. It is, therefore, a general rule that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge. Therefore, it is not allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted"**—Russell on "Crimes" (6th ed.), vol. iii. p. 403. Thus it was resolved by all the Judges nearly one hundred years ago in *R.* v. *Cole*, Mich. T. 1810 (cited in Russell on "Crimes," vol. iii., p. 403, note (*n*) from manuscript), that in a prosecution for an infamous crime an

admission by the prisoner that he had committed such an offence at another time, and with another person, and that he has a tendency to such practices, ought not to be received in evidence. "The law of England," said Lord Campbell, C.J., in *Reg.* v. *Oddy* (*a*), "does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first." And the same law has, twelve years ago, been re-stated in a judgment of the Privy Council in *Makin* v. *Att.-Gen. of New South Wales* (*b*). . . .

The established limitations of the general rule and the "apparent exceptions" to it "at Common Law," to use the language of Archbold's "Criminal Pleading, Evidence, and Practice (23rd ed.), p. 306, are, I venture to think, at the present time reasonably plain, and referable to definite and intelligible principles, although the discussion of the present case has amply shown it is not always easy to say whether a particular case falls within the rule or within the apparent exceptions.

The general rule cannot be applied where the facts which constitute distinct offences are at the same time part of the transaction which is the subject of the indictment. Evidence is necessarily admissible as to acts which are so clearly and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible. So, in *R.* v. *Wylie* (*c*), Lord Ellenborough, after mentioning a case where a man committed three burglaries in one night, and stole a shirt at one place and left it at another, and they were all so connected that the Court heard the history of all the three burglaries, remarked that "if crimes do so intermix the Court must go through the detail"—cited in Roscoe, p. 79. Instances are cited in Russell on "Crimes"

(*a*) 20 L. J. M. C. 198.

(*b*) [1894] A. C. 57; 63 L. J. P. C. 41. The judgment was cited in full by A. T. Lawrence, J. See *post*, p. .

(*c*) 1 Bos. & P. (N.R.) 92, at p. 94; *sub nom. Rex* v. *Whiley*, 2 Leach C. C. 983, at p. 985.

(6th ed.), vol. iii., pp. 403—411, and Archbold's "Criminal Pleading" (23rd ed.), pp. 307, 308. *Reg.* v. *Firth* (*d*) is a recent example of this class. *Reg.* v. *Rearden* (*e*) illustrates the limitation upon the general rule in the case of rape. Mr. Justice Willes, who presided at the trial in *Reg.* v. *Rearden*, cited, in support of his ruling, a case on the Western Circuit—a case of larceny of grain from a barn—in which he had admitted evidence of the owner of the barn that he had watched and detected several stealings by the same person. Such prior acts formed, in point of historical and circumstantial connection, inseparable parts of the transaction which the jury had to investigate. Within this same limitation, I think, come the cases of trial for murder, and wounding with felonious intent, in which evidence is admissible to show prior assaults of the prisoner upon the murdered or injured person, or menaces uttered to him by the prisoner; or to show, conversely, irritating behaviour of the deceased to the prisoner, as in *Reg.* v. *Hagan* (*f*). The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial.

In my view, if we pass from the consideration of the necessary limitation which I have just illustrated, we shall find that the cases to which Archbold refers as "apparent exceptions," at common law, to the general rule are almost all cases in which evidence of transactions other than that which forms the subject of the indictment has been admitted as relevant to the issue as negativing the defence of accident or mistake in cases in which accident or mistake, if proved, would constitute a complete defence to the accusation. This is, I think, the principle upon which, in the group of reported murder cases, of which *Reg.* v. *Geering* (*g*), *Reg.* v. *Cotton* (*h*), *Reg.* v. *Roden* (*i*), and *Makin* v. *Att.-Gen. of New South*

(*d*) 38 L. J. M. C. 54; L. R. 1 C. C. R. 172.
(*e*) 4 F. & F. 76.
(*f*) 12 Cox C. C. 357.
(*g*) 18 L. J. M. C. 215.
(*h*) 12 Cox C. C. 400.
(*i*) 12 Cox C. C. 630.

Wales (*k*), are familiar examples, evidence has been held admissible to prove the happening of like fatalities to persons other than the person with whose murder the prisoner is charged, under circumstances in which those other fatalities may reasonably be connected with actions on the part of the prisoner. *Reg.* v. *Geering* may be taken as a type. On an indictment against a prisoner for the murder of her husband by arsenic in September, 1848, evidence was tendered by the prosecution of arsenic having been taken by the prisoner's two sons, one of whom died in December and the other in March subsequently, and also by a third son who took arsenic in April following, but did not die. Proof was given of a similarity of symptoms in the four cases. Evidence was also tendered that the prisoner lived in the same house with her husband and sons, that she prepared their tea, cooked their victuals, and distributed them to the four parties. *Held*, that this evidence was admissible for the purpose of proving—first, that the deceased husband actually died of arsenic; secondly, that his death was not accidental; and that it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony. In *Makin* v. *Att.-Gen. of New South Wales* the judgment of the Privy Council expressly approved the ruling in *Reg.* v. *Geering*, after a review of the cases, Lord Herschell, L.C. (who delivered judgment), remarking that it could not be denied that the decisions had not been completely in accord, and disapproving of the contrary ruling in *Reg.* v. *Winslow* (*l*). It is really upon the same grounds that in a large number of cases, other than cases of murder, evidence of other prior acts of the prisoner, possibly themselves constituting crimes of the same nature as the charge upon which the prisoner is on his trial, has been admitted, although these prior acts do not historically form part of the circumstances of that charge. Here, again, the evidence has been admitted as negativing accident or mistake in regard to the occurrence which is the subject of the indictment. In all these cases it will, I think, be found that the occurrences of which evidence was admitted were occurrences connected with

(*k*) *Ubi supra.* (*l*) 8 Cox C. C. 397.

conduct on the part of the accused, so repeated, and so closely linked in point of time as well as character with the offence for which the prisoner was on his trial, that, according to the test of justice as well as of common sense, there could be no serious challenge of its relevancy to the issue as to accident or mistake on the part of the accused in the particular case which formed the subject of the indictment. "When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant" (Stephen's "Digest of the Law of Evidence," art. 12). The principle was clearly stated by Lord Russell of Killowen, C.J., when delivering the judgment of this Court in *Reg.* v. *Rhodes* (*m*). He quotes with approval the judgment of Lord Coleridge, C.J., in *Reg.* v. *Francis* (*n*). The evidence "tends to show that" the prisoner "was pursuing a course of similar acts; and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often, than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last." So in a later case, cited in argument in the present case—*Reg.* v. *Ollis* (*o*)—Mr. Justice Wright expounded the principle in similar terms, dwelling upon the importance of the element of nearness in point of time and circumstance in determining the relevancy, and therefore the admissibility, of the evidence as to other acts of the accused. "The evidence," said the learned Judge at p. 924 of the *Law Journal* report, "tended to show that the conduct of the prisoner in sending drafts on a bank at which he had no living account was not inadvertent or accidental, but was part of a systematic fraud extending over a period immediately preceding and following the date of the offence charged, and the case in this respect seems to me to be governed by *Reg.* v. *Francis*

(*m*) [1899] 1 Q. B. 77; 68 L. J. Q. B. 83; *ante*, p. 168.
(*n*) L. R. 2 C. C. R. 128; 43 L. J. M. C. 97, *ante*, p. 170.
(*o*) [1900] 2 Q. B. 758; 69 L. J. Q. B. 918.

and *Reg.* v. *Rhodes*." Mr. Justice Bruce, one of the dissenting Judges in the same case of *Reg.* v. *Ollis*, at p. 926 of the *Law Journal* report, lays down the law to the like effect, and even with greater strictness: "A line of cases has established the rule that when it becomes material to establish that an act charged in the indictment, and proved to have been done, was intentional and not accidental, evidence is admissible of similar acts, done by the same person, having no bearing upon, or connection with, the acts charged in the indictment, save that the acts are similar and done by the same person. This rule is somtimes stated, I think inaccurately, to be a rule which admits indirect evidence of this class to prove guilty knowledge. The evidence is, I believe, admissible under the rule I have mentioned only on the ground that it tends to negative mistake or accident. It is quite true that in many cases to negative mistake or accident is to leave no other alternative but that the act was intentionally done with a criminal intent. But the ground on which this indirect evidence is admissible is that it tends to negative mistake or accident."

It is in strict accordance with the principles thus enunciated by these authorities that evidence of conduct of the prisoner on other occasions was admitted in cases of arson—*Reg.* v. *Gray* (*p*); of embezzlement—*Reg.* v. *Richardson* (*q*); of false pretences—*Reg.* v. *Francis* and *Reg.* v. *Rhodes*; of coining—*R.* v. *Fuller* (*r*) and *Reg.* v. *Weeks* (*s*); of forgery—*R.* v. *Wylie* (*t*) and *Reg.* v. *Colclough* (*u*); of obtaining credit by fraud—*R.* v. *Wyatt* (*x*).

In all these cases it was necessary to negative accident or mistake; in all of them the multiplication of similar acts, having some connection in time and circumstance and nature to the act which was the subject-matter of the trial, was admitted to proof as evidence showing systematic conduct of

(*p*) 4 F. & F. 1102.
(*q*) 2 F. & F. 343; 8 Cox C. C. 448.
(*r*) Russ. & R. 308.
(*s*) 30 L. J. M. C. 141; 8 Cox C. C. 455; L. & C. 18.
(*t*) *Ubi supra.*
(*u*) 10 L. R. Ir. 241; 15 Cox C. C. 92.
(*x*) [1904] 1 K. B. 188; 73 L. J. K. B. 15.

the prisoner at the time of the offence charged against him, and therefore negativing accident or mistake on his part in the last case. **But it must, I think, be admitted that, apart from judicial *dicta* (which, although deserving of respect, cannot be treated with the weight which attaches to a decision), there is authority, which, speaking for myself, I am not prepared to overrule, that when the question of criminal intent is material, then, although in strictness the case is not one of disproving merely accident or mistake, evidence of prior occurrences may become admissible against the prisoner.** I say this with special regard to the authority of *Reg.* v. *Cooper* (*y*)—a case which has never been dissented from, and in which the point was fully argued before Mr. Justice Cresswell. It was not cited to us in argument, and therefore I think it well to state the salient facts and the reasoning of the eminent Judge who presided at the trial, which renders the case peculiarly relevant to the matter now before us, because he takes the case of a charge of abortion as an illustration of the admissibility of a number of similar acts to negative evidence of intent. The prisoner was charged with accusing a person of an unnatural crime with intent to extort money, and in the course of the trial an argument arose as to the admissibility of a question whether one of the witnesses had seen the prisoner, who was a soldier, come off guard on former occasions with money in his possession, and as to what he said as to the means by which he had obtained that money; and Mr. Justice Cresswell said at p. 549: "I do not think that this is at all a question of character. The evidence is not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question is, whether on this occasion he did an act with the design of effecting a certain object. One step in the proof is to show that he would be likely to know that a certain result would follow, and if it can be proved out of his own mouth that he was aware that such result would be produced, it is one ingredient in the necessary proof that he contemplated it. Suppose a charge against a man that he had attempted to procure abortion: the same medicine might be

(*y*) 3 Cox C. C. 547.

administered with that intention or without it. If it could be proved that he had often given that medicine before, and that he knew that abortion had always followed, surely that would be evidence against him." **In my opinion, it does not follow that, to prove a criminal intent, it is competent for the prosecution to prove the occurrence of a single prior act of the like criminal nature. The admissibility, and not merely the weight, of the evidence depends, in my view, upon the evidence which it is proposed to adduce being evidence of such conduct as could authorise a reasonable inference of a systematic pursuit of the same criminal object.**

In the present case, as it appears to me, there is no question, in strictness, of accident or mistake. It was not disputed that the accused, a qualified surgeon, as I understand the facts, but not at the time in active practice, had used the surgical instruments upon Ethel Annie Jones. Did he use them for a lawful or for an unlawful purpose? That was the sole issue; in other words, had he or had he not in using them the *mens rea*? In my opinion, if the evidence here had consisted solely of the single act alleged by the witness Gertrude Taylor to have been done to her nine months before, it ought not to have been admitted. Such a single isolated act is not just ground for any inference; and one act from which no inference can justly be drawn ought not to be allowed to go before the jury. . . . But the evidence given by Taylor was not confined to evidence of the single act. It included a statement by the prisoner to Taylor which might fairly be interpreted to mean that he had successfully performed a similar operation upon dozens of girls; in other words, that he had often used the same instruments before, and had always found that abortion followed. Upon the reasoning of Mr. Justice Cresswell in *Reg.* v. *Cooper* (*z*)—see especially p. 550—and upon the authority of that judgment, it appears to me that such evidence of the admission by the prisoner of a course of conduct cannot be excluded. . . .

Darling, J.—It has been agreed that such evidence may not be admitted to prove intent. **It cannot be said that no**

(*z*) *Ubi supra.*

evidence is admissible to prove intent; for declarations of a defendant's intention, and unequivocal acts of his, are every day given in evidence with that object. Moreover, accident is negatived merely in order to prove design, which involves intent. System is proved for the same reason, and proof of *scienter* **is merely a step towards that end.** Where ignorance is the defence relied on, the cases I have cited show that evidence is admissible to prove knowledge. Where accident is suggested as a defence, evidence is equally admissible to disprove that by showing design, and it follows that such evidence may go to prove further what particular design actuated the perpetrator of the act. Such evidence assuredly cannot be inadmissible merely because it is more cogent in so far as it shows not only the existence of some design, but also precisely what that design was. Here the defence suggested was that the act charged was done designedly, but that the design was lawful, and the reason of its being so is indicated. Then this evidence is tendered by the prosecution to the effect that on another woman, pregnant by him, the defendant had performed a similar act or operation with like instruments, and had then stated in effect that his design on that occasion was unlawful—namely, to procure abortion.

In my opinion, this evidence of Taylor is not irrelevant or foreign to the point in issue, that issue being not what did he do, but with what object did he do it? That issue involves the state of his knowledge or belief as to the effect of such an operation. Taylor's evidence went to prove that, contrary to the defendant's allegation in defence as to his being engaged in doing a lawful act, he was doing a thing which, in his view, was apt to procure abortion; and that because it was so he had already done it with that unlawful avowed knowledge and purpose. This evidence, therefore, tends to prove that the defendant had, in repeating his former conduct, an intention different from that alleged by him in his defence; so it is not foreign to the point of it, nor less relevant because it goes to prove the charge in the indictment.

A. T. Lawrence, J.—I am of opinion that the evidence of the girl Taylor was admissible and that the conviction should be affirmed.

The general rule is stated by Lord Herschell in these terms: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused (*a*)." The relevance depends upon the issues actually in contest; whenever it is in issue whether the prisoner, though he did the act alleged, did it without any intention—that is, accidentally or without any criminal intention—that is, innocently, such evidence may be given.

By showing that the prisoner did an act of the same character under similar circumstances on other occasions, accident becomes improbable. That the same accident should repeatedly occur to the same person is unusual, especially so when it confers a benefit on him. The degree of improbability will depend upon the number of times it is shown to have occurred and the similarity of the circumstances on each occasion. **If the act charged is manifestly an intentional act, but the defence is that it was honestly or properly done, such evidence is admissible to rebut this defence by showing knowledge of some fact essential to guilty knowledge, or by showing that in other cases similar acts have been committed by the prisoner by the like means under the like circumstances. The numbers and the peculiarity of the circumstances tend to shew the improbabilty of the innocent intention.** It is for this reason, in cases of fraud, where it is necessary to show a fraudulent intent in the prisoner, that other acts of the like character are briefly described as a system. There is no special

(*a*) *Makin* v. *Att.-Gen. of New South Wales* (*ubi supra*).

rule of the law of evidence applicable to accident or to system. These are merely convenient phrases indicative of cases in which evidence of this character is admissible. A system is not necessarily criminal: most men carry on business on a system, they may even be said to live on a system. Where, however, acts are of such a character that, taken alone, they may be innocent, but which result in benefit or reward to the actor and loss or suffering to the patient, repeated instances of such acts at least show that experience has fully informed the actor of all their elements and details, and it is only reasonable to infer that the act is designed and intentional, and its motive the benefit or reward to himself or the loss or suffering to some third person.

The mind of the prisoner can only be revealed by his words or by his acts. It is in many cases impossible to form a sound conclusion upon the state of his mind at a given moment unless his words and acts under similar circumstances are subjected to investigation. It is for this reason that I think the words of Lord Herschell, "to rebut a defence which would otherwise be open to the accused," are an essential part of the proposition of law.

This idea is also expressed by Lord Alverstone in *R.* v. *Wyatt* (*b*), when he says that **such evidence is admissible "as negativing any accident or mistake or the existence of any reasonable or honest motive."** Any statement of the law which omits this latter part of the proposition would seriously cramp the administration of justice and cannot be supported upon principle. Roscoe, in his "Digest of Criminal Evidence" (12th ed.), p. 80, says, "there are cases in which much greater latitude is permitted, and evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intention in doing the act complained of." The authorities in my opinion support this view. In *Blake* v. *Albion Life Assurance Society* (*c*) it was necessary to show that the defendant company knew of the fraud of Howard at the time they

(*b*) *Ubi supra.* (*c*) 4 C. P. D. 94; 48 L. J. C. P. 169.

received the plaintiff's money. The acts of the company towards the plaintiff were all, taken alone, ordinary business transactions; in order to show knowledge of the fraud it was necessary to show that they had had other transactions of a similar character with other persons, and that "Howard" was sometimes "Gard" and sometimes "Rogers" and other assumed names, but that on each occasion the premium went to the company and no loan to the assured. In *R.* v. *Francis* (*d*) guilty knowledge that a certain ring was falsely described as a diamond ring was shown by evidence of a previous dealing with a chain and several attempts to deal with other rings within a short space of time. Here the connection between the several acts lay in the nature of the goods, trinkets, or jewellery, and the class of persons defrauded or attempted to be defrauded—namely, pawnbrokers. This rendered a plan or scheme of fraud probable. In *R.* v. *Rhodes* (*e*) evidence of two instances of obtaining eggs by false pretences by means of an advertisement was admitted, although these eggs were obtained subsequently to the acts charged in the indictment. The business to which this advertisement related was said by the prosecution to be a sham or bogus business, and these two instances were held to throw a light back upon the prisoner's state of mind when he obtained the eggs for which he was indicted, the *nexus* or connection being the same advertisement of the same business. In *Reg.* v. *Ollis* (*f*), the prisoner was charged with obtaining money by false pretences on three cheques on June 24, June 26, and July 6. At the trial evidence was admitted relating to a cheque which the prisoner was alleged to have obtained fraudulently by giving another valueless cheque dated July 5 for it. The prisoner had already been tried and acquitted of this fraud. It was held to be rightly admitted as evidence of guilty knowledge. Mr. Justice Bruce differed because he considered the important question was the prisoner's knowledge of the state of his banking account, and it was not shown that the cheque of July 5 had been returned dishonoured before July 6, when he gave the last of the cheques mentioned in the indictment. Inasmuch

(*d*) *Ubi supra.* (*e*) *Ubi supra.* (*f*) *Ubi supra.*

as the prisoner had been adjudicated a bankrupt in the previous May, and the account at the bank upon which all the cheques were drawn showed a credit balance of only three shillings and sixpence, and nothing had been paid into or drawn out of it for three years, the majority of the Court thought the evidence admissible, Lord Russell of Killowen saying that the criticism of Mr. Justice Bruce went rather to the weight of evidence than to its admissibility. In *Rex* v. *Wyatt* (*g*) the prisoner was charged with obtaining credit (for lodgings and food) by fraud. Evidence was admitted of his having obtained lodgings, &c., at several other places and having left without paying for them. Evidence of the same character has been admitted for many years in coining cases, in uttering forged documents, in embezzlement, and in murder.

The cases relied upon as opposed to this view are not so when looked into. In *Reg.* v. *Oddy* (*h*) the charge was one of larceny and receiving of cloth. Evidence was tendered that other cloth which had been stolen was found in the house of the accused. This evidence was rejected as not being admissible to show guilty knowledge when receiving the cloth covered by the indictment. There was here no connection between the charge and the fact tendered in evidence except that both related to cloth. Each was found shortly after it was stolen, and several months had elapsed between the two larcenies. Recent possession of stolen goods is evidence of the larceny of the goods in question. It would be illogical to hold that the same fact—namely, recent possession—can be evidence of two crimes so widely different in the detail of their circumstances as theft and receiving knowing the thing to be stolen. In *Reg.* v. *Holt* (*i*) evidence of facts alleged to constitute a similar pretence to that charged was rejected. It was inadmissible, for the pretence charged was that the prisoner had pretended that he had authority to receive money on behalf of his principal, when he had not. The only defence raised was that in fact he had such authority. It was not relevant to that issue to show he had received other money on the same

(*g*) *Ubi supra.*
(*h*) *Ubi supra.*
(*i*) 8 Cox C. C. 411; 30 L. J. M. C. 11.

statement. It tended to support the defence quite as much as the prosecution—see *per* Mr. Justice Blackburn in *R.* v. *Francis*. In *R.* v. *Dale* (*k*), as reported, the admissibility of evidence of this class would seem to have been carried too far. The report lends colour to the view that this evidence was admissible when the only issue raised was as to the fact of the prisoner's having used the instrument. In such a case such evidence would not be admissible. It is to be observed, however, that the only ruling of the learned Judge was one given during the opening statement of counsel for the prosecution. The evidence never was in fact admitted, for the prisoner pleaded guilty before any evidence was tendered.

In all cases, in order to make evidence of this class admissible there must be some connection between the facts of the crime charged in the indictment and the facts proved in evidence. In proximity of time, in method, or in circumstances there must be a *nexus* between the two sets of facts, otherwise no inference can be safely deduced therefrom.

In the present case the prosecutrix Ethel Jones was an inmate of the prisoner's house. He had induced her to have sexual connection with him by promising to "keep her right." When she feared she was in trouble he said he would do so, and he used instruments upon her which he said would bring it away. When arrested he stated that he had used the instruments for a lawful purpose, and that when she became very ill in consequence he administered drugs to allay the pain. In support of this defence it was suggested that he used the instruments when examining her for leucorrhœa, and that the subsequent illness was neither foreseen nor intended by him. The evidence of Taylor was tendered to rebut this defence. It was shown that she too was an inmate of his house, that he had induced her to have sexual connection with him, that when her periods should have arrived and before she left for home he used the same instruments in the same way, saying he would "put her right as he had put dozens of other girls before." If evidence of system were needed, this was such evidence. So also was the evidence as to a statement made

(*k*) 16 Cox C. C. 703.

by Nellie Cornes, a servant of the prisoner, who was present at the operation, which statement was to the effect that the prisoner had "put her all right." The operation was unsuccessful in the case of Taylor. But that was due not to the nature of the operation, but to the stage of the pregnancy then reached. For the prisoner told the witness that, if she did not get right, not to go more than six weeks and then he would operate again. In due time a child was born, for the maintenance of which the prisoner consented to an affiliation order. **It is impossible, without reversing a long series of cases, to say that the evidence of Taylor was not admissible. It showed that the illness of the prosecutrix was the result of design and not of accident; it showed that the prisoner's scheme or system, when the indulgence of his passions had got girls into trouble, was to use these instruments upon them to relieve himself of the burden of paternity. It tended to rebut the defence he set up of an innocent operation and to negative any reasonable or honest motive for its performance.**

184.

R. v. ARMSTRONG.

[1922] 91 L. J. K. B. 904.

Evidence of similar acts. [The facts appear from the judgment.]

Judgment of the Court of Criminal Appeal, delivered by:

Lord Hewart, C.J.—In this case the appellant was convicted before Darling, J., at the Hereford Assizes, on April 13 last, of the murder of his wife, and was sentenced to death. He appeals against the conviction; and the points of substance raised by the notice of appeal are (1) that evidence of an attempt to poison one Oswald Norman Martin, some eight months after the death of the appellant's wife, ought not to have been admitted, and (2) that on that evidence the learned Judge misdirected the jury. There is no need to repeat the facts in detail. It is enough

to say that, in the opinion of this Court, the evidence was amply sufficient to justify the verdict of the jury, even though nothing relating to Martin were taken into consideration. That evidence proved, among other things, that the appellant's wife died on February 22, 1921, of arsenical poisoning; that a fatal dose of arsenic was administered to her within twenty-four hours of her death; that she suffered from the same kind of poisoning both in August, 1920, before her removal to an asylum, and in February, 1921, soon after her return home; that the appellant purchased arsenic shortly before each of those occasions; that he was the only person who, on both occasions, had the opportunity of administering arsenic to his wife; and that his possession of arsenic, made up in small packets of fatal doses, including the packet found upon him at the time of his arrest, was not consistent with any legitimate purpose.

The evidence further went to show that he had a twofold motive for murder—namely, the desire to obtain the benefit to be derived under a new will made by his wife in July, 1920, and the desire to contract another marriage. The suggestion that his wife committed suicide was refuted, not only by the words which she used on more than one occasion towards the end of her illness, but also by her physical condition, which, for a considerable time before her death, made it impossible for her to leave her bed.

As to the question of the admissibility of the evidence relating to Martin, it is to be observed that the decision in *Reg.* v. *Geering* (*a*) was established as an unquestionable authority by the decision in *Makin* v. *Att.-Gen. for New South Wales* (*b*). The only difference between *Geering's Case* and the present case is that, while in *Geering's Case* there was evidence of the actual administration of food which might have contained arsenic, in the present case there was evidence of the opportunity for such administration, strengthened by evidence of possession of arsenic by the appellant at the material times, a fact which does not appear in the report in *Geering's Case*.

(*a*) [1849] 18 L. J. M. C. 215.
(*b*) [1894] A. C. 57; 63 L. J. P. C. 41.

In the opinion of this Court, it would suffice to say that, on the authority of *Geering's Case*, the evidence which is here complained of was admissible. But it is suggested that, in the absence of direct evidence of some act done by the appellant towards the commission of the crime with which he was charged, evidence as to the subsequent attempt on the life of Martin in October, 1921, was inadmissible, because at an early stage of the trial counsel for the appellant intimated that the defence would be that Mrs. Armstrong committed suicide by taking arsenic, and that no defence of accidental poisoning would be raised. Counsel for the appellant, it may be added, in his argument before this Court, very properly stated that he sought to make no point of the fact that the events relating to Martin were subsequent to the death of the appellant's wife, and, moreover, that the lapse of time between February and October, 1921, was immaterial.

Now, in the opinion of the Court, an intimation given by counsel at an early stage of the case as to the defence upon which he proposes to rely cannot preclude the prosecution from offering any necessary evidence to show that the accused committed the crime. It was an essential part of the case for the prosecution here to prove that arsenic was designedly administered by the appellant to his wife, and any evidence that tended to prove design must of necessity tend to negative accident and suicide. A few days before her last illness began the appellant's wife had been brought home from the asylum at the request, and in consequence of the diligent negotiations, of the appellant himself. The evidence showed that those negotiations and requests began on or about January 10, 1921, and that on January 11 the appellant purchased a quarter of a pound of white arsenic and took it home.

With what design did he make that purchase, and provide himself at that particular time with that poison? Was it for the innocent purpose of destroying weeds, or for the felonious purpose of poisoning his wife? The fact that he was subsequently found not merely in possession of, but actually using for a similar deadly purpose, the very kind of poison that caused the death of his wife was evidence from which the jury might infer that that poison was not in his possession at the

earlier date for an innocent purpose; and such use of the same poison is more cogent than the mere fact of death from the same poison, as in *Geering's Case*; see *Thompson* v. *The King* (*c*) and the illustrations there given.

Reference was made in the argument in the present case to the case of *Perkins* v. *Jeffery* (*d*). But the decision in that case was not inconsistent with the decision in *R.* v. *Boyle* (*e*). Lord Reading was a party to both decisions, and the decision in *R.* v. *Boyle* was cited in support of the later decision. The distinction is that in *Perkins* v. *Jeffery* identity was in dispute, and, until that was established, evidence of design or intention was not relevant. In the opinion of the Court, *Geering's Case* and *Reg.* v. *Garner* (*f*) are not so strong as the present case, and the facts of the present case are stronger in favour of the admission of the evidence complained of.

There was the clearest possible evidence that the appellant, on January 11, 1921, purchased a quarter of a pound of white arsenic, and that when he was arrested on December 31, 1921, he had in his pocket a packet containing a fatal dose of white arsenic. **In these circumstances, so soon as he stated the defence, as he at once did, that he bought and was keeping the poison for the innocent purpose of destroying weeds, it was open to the prosecution to show by means of the evidence relating to Martin that the appellant neither bought nor kept the poison for that pretended innocent purpose.** The question which is involved here, as Lord Sumner said in *Thompson's Case* (*g*), "raises no new principle of law; it elucidates no new aspects of familiar principles. It is a mere question of the application of the rules of evidence to this particular case."

As to the summing-up of the learned Judge, exception was taken to the passage: "I came to the conclusion that Martin's case has a bearing upon this. What is the bearing? The bearing is this: that it is of value as showing that the defendant had arsenic in his possession, and that he would use it to

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(*c*) [1918] A. C. 221; 87 L. J. K. B. 478.
(*d*) [1915] 2 K. B. 702; 84 L. J. K. B. 1554.
(*e*) [1914] 3 K. B. 339; 83 L. J. K. B. 1801.
(*f*) (1864) 4 F. & F. 346.
(*g*) [1918] A. C. at p. 236; 87 L. J. K. B. at p. 486.

poison a human being. Let me say at once, if he is not proved to have given arsenic to Mr. Martin with intent to injure and kill him, if you come to the conclusion that he did not do that, then all the evidence in Martin's case has no bearing whatever upon this case—none at all. But if you come to the conclusion that he did give it, why, then, it has a bearing, as showing what he had got in the way of poison and what he was prepared to do with it; as showing that he was prepared not merely to use it on dandelions and things of that kind, but that he was prepared to use it on a human being if he had what to him appeared sufficient reason to do so."

If that passage meant, or, in the circumstances, was likely to be understood to mean, that the appellant was a man who was in the habit of committing, and might be expected to commit, this particular crime, then it would obviously be a misdirection, and the proviso to s. 4 of the Criminal Appeal Act, 1907, would have to be considered. But it is difficult to imagine that the learned Judge, with or without the authorities before him, intended to convey any such thing. To any intelligent person who was present at the trial, or who has read the transcript of the evidence, the speeches of counsel, and the summing-up, it must be obvious that the particular passage was directed to the plain question that had emerged—namely, did the appellant buy and keep this poison, as he alleged, for the innocent purpose of destroying weeds, or did he buy and keep it, as the prosecution alleged, for a felonious purpose? Nothing is less useful in such a controversy than to take a particular sentence from the whole of a voluminous context, and to approach its examination for the purpose of establishing a certain criticism. The proviso to s. 4 of the Criminal Appeal Act, 1907, does not, in the opinion of the Court, arise. But, in any event, it was the evidence, and not the reason for its admission, that must have influenced the jury; and we are clearly of the opinion that the jury in this case would certainly have returned the same verdict, even if the summing-up had not contained the passage to which reference has been made.

185.

R. v. CHRISTIE (H. L.).

[1914] 83 L. J. K. B. 1097.

Evidence. Statements made in the presence of the accused. Statements forming part of an act. Statements forming part of the *res gestæ*. [The facts appear from the speech of Lord Atkinson.]

Lord Atkinson.—This is an appeal from an order of the Court of Criminal Appeal dated October 27, 1913, whereby the conviction of the respondent under s. 62 of the Offences Against the Person Act, 1861, for indecently assaulting a boy named Frederick Butcher, of about five years of age, was quashed, and a verdict and judgment of acquittal directed to be entered upon the indictment upon which the respondent had been convicted. . . .

The questions of law arising on the appeal are: first, whether a certain statement made by this boy Butcher in the presence and hearing of the accused and of a police constable was properly admitted in evidence; and secondly, whether the child having been permitted under the powers of s. 30 of the Children Act, 1908 (8 Edw. 7. c. 67), by the deputy chairman, before whom the case was tried, to give evidence without being sworn, the Judge had misdirected the jury by telling them that the statement so made by the boy in presence of the accused was, within the meaning of that section, material evidence implicating the accused, in corroboration of the boy's testimony given at the trial.

The little boy when examined as a witness proved what had been done to him, and identified the prisoner as the person who had done it, but was not asked any questions, and did not give any evidence in reference to any previous identification of the accused by him, nor refer to any statement previously made by him in the presence of the accused. He was not cross-examined upon his evidence of identification given at the trial.

The boy's mother, Mrs. Charlotte Butcher, and Constable William Crooks were examined. The latter proved that

he was stationed at Edmonton, and that having received certain information, he went to a field off Winchester Road, saw a number of people, including the prisoner, Mrs. Butcher, and her son standing there; that she made a complaint to him (the constable) that a man had assaulted her son; that he then asked the boy which was the man, whereupon the boy went up to the accused, touched him upon the sleeve of his coat, and said, "That is the man"; that he (the constable) then asked the boy, "What did he do to you?" in reply to which question the boy made a statement giving full particulars of the offence charged.

The Attorney-General contended that the entire statement of the boy was admissible on each of four separate grounds: First, as part of the act of identification, or as explanatory of it. Secondly, as a statement made in the presence of the prisoner in circumstances calling for some denial or explanation from him, the truth of which he admitted by his conduct and demeanour. Thirdly, as proof of the consistency of the boy's conduct before he was examined with the testimony given by him at the trial. Fourthly, as part of the *res gestæ*.

Your Lordships intimated during the course of the argument that you would not consider this third point. It is therefore unnecessary to refer to it further.

Of course, it will suffice for the Attorney-General's purpose if the statement be admissible on any of these grounds. It is, I think, clear that the principle laid down in *Reg.* v. *Lillyman* (*a*), and in those cases which followed, has no application to the present case. In those cases it was decided that in rape and other sexual crimes committed against women the statement of the prosecutrix made in the absence of the accused in the form of a complaint, immediately or soon after the commission of the offence, is admissible in evidence, even though the full details of the crime be stated. In that case consent was immaterial on the charge in the first count of the indictment, upon which alone the prisoner was convicted, though it was material on some of the other counts. It is admitted that such a statement is no evidence against the

(*a*) [1896] 2 Q. B. 167; 65 L. J. M. C. 195.

accused of the facts stated. There is some conflict between the authorities as to the particular grounds upon which such statements are admitted, but I think that the general result of the cases is that the complaint is only admissible to negative consent. It is to be remembered that statements admitted under heads 1 and 4 are not, as against the accused, affirmative evidence of the facts stated, but only of the knowledge of, or the belief in, those facts by the person who makes the statement, or of his intention in respect of them. They must, of course, in order to be admissible, be relevant to the issue, the guilt of the accused of the offence charged against him.

As to the first point, it cannot, I think, be open to doubt but that if the boy had said nothing more, as he touched the sleeve of the coat of the accused, than "That is the man," the statement was so closely connected with the act which it accompanied, expressing, indeed, as it did, in words little if anything more than would have been implied by the gesture *simpliciter*, it should have been admitted as part of the very act of identification itself. It is on the admissibility of the further statement made in answer to the question of the constable that the controversy arises. On the whole, I am of opinion that this statement only amplifies that which is implied by the words "That is the man," plus the act of touching him.

A charge has been made against the accused for the offence committed on the boy. The words "that is the man" must mean that is the man who has done to me the thing of which he is accused. To give the details of the charge is merely to expand and express in words that which is implied in the act of identification. I think, therefore, that the entire statement was admissible on these grounds, even although the boy was not asked at the trial anything about the former identification.

As to the second ground, the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he

accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement is made amount to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them.

Of course, if at the end of the case the presiding Judge should be of opinion that no evidence has been given upon which the jury could reasonably find that the accused had accepted the statement so as to make it in whole or part his own, he can instruct the jury to disregard the statement entirely. It is said that, despite this direction, grave injustice might be done to the accused, inasmuch as the jury, having once heard the statement, could not, or would not rid their mind of it. It is, therefore, in the application of the rule that the difficulty arises. The question then is this: Is it to be taken as a rule of law that such a statement is not to be admitted in evidence until a foundation has been laid for its admission by proof of facts from which, in the opinion of the presiding Judge, a jury might reasonably draw the inference that the accused had so accepted the statement as to make it is own in whole or in part? or is it to be laid down that the prosecutor is entitled to give the statement in evidence in the first instance leaving it to the presiding Judge in case no such evidence as the above-mentioned should be ultimately produced, to tell the jury to disregard the statement altogether.

In my view the former is not a rule of law, but it is, I think, a rule which, in the interest of justice, it might be most prudent and proper to follow as a rule of practice. . . .

The course pursued when accomplices are examined as

witnesses is very analogous to that suggested. It is not a rule of law that the evidence of an accomplice must be corroborated in order to render a conviction on his evidence valid—*R.* v. *Atwood* (*b*), *Meunier, In re* (*c*); but it is a general rule of practice that Judges should advise juries not to convict on the evidence of an accomplice unless it be corroborated, and this is a matter entirely for the discretion of the Judge before whom a case is tried—*Reg.* v. *Stubbs* (*d*) and *Reg.* v. *Boyes* (*e*).

Again, if two persons are jointly indicted and tried together, the statements made by each are generally only evidence against him who makes them. Under certain circumstances they may be evidence against both, but if they be only evidence against him who makes them, injustice to the other accused is guarded against by the presiding Judge telling the jury that this is so. There is no sufficient reason, I think, to suppose that injustice to the accused could not be effectually guarded against by the Judge instructing the jury that they should discard from their minds a statement not found to have been accepted by the accused as his own.

The boy's statement was so separated by time and circumstance from the actual commission of the crime that it was not, I think, admissible as part of the *res gestæ*. In *Thompson* v. *Trevanion* (*f*), tried before Chief Justice Holt, sitting at Nisi Prius, it was held that what a woman said immediately on a hurt being received by her, and before she had time to contrive anything for her own advantage, might be given in evidence. The rule is there stated to rest on the absence of time or opportunity for concoction. In *Reg.* v. *Bedingfield* (*g*), a woman rushed out of a room with her throat cut almost through, made a statement to some women whom she met, and expired in a very short time. Her husband was found in this room with his throat cut also. The question at issue was murder or suicide. Chief Justice Cock-

(*b*) (1788) 1 Leach C. C. 464.
(*c*) (1855) 63 L. J. M. C. 198; [1894] 2 Q. B. 415.
(*d*) [1855] 25 L. J. M. C. 16; Dear. C. C. 555.
(*e*) [1861] 30 L. J. Q. B. 301; 1 B. & S. 311.
(*f*) (1693) Skinner, 402.
(*g*) (1879) 14 Cox C. C. 341.

burn said, "it [the woman's statement] is not so admissible, for it was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard." In other cases, such as *R.* v. *Foster* (*h*) and *Reg.* v. *Lunny* (*i*), the rule was applied with less strictness. I have found no authority, however, which would justify the admission of any part of the boy's statement as part of the *res gestæ*.

Even, however, if the boy's statement was admissible in evidence if properly dealt with, I think that the verdict should be quashed. The deputy chairman never explained properly to the jury that it is what the accused accepts as his own of the statement made in his presence that is evidence against him, not the statement itself. Again, he treated the evidence of the mother of the boy and the constable, as to what the boy said and did on the occasion of the identification, as corroboration of his testimony at the trial, within the meaning of s. 30 of the Children Act of 1908. This is, of course, wholly erroneous. If the boy himself had been examined, either in chief or on cross-examination, and had detailed what took place at the identification, this portion of his evidence could not be treated as corroboration of the other portion proving the charge. He could not be his own corroborator. It can make no possible difference when others tell what he did and said on that occasion. Their evidence is no more "material corroborative evidence in support of his evidence at the trial implicating the accused" than his would be.

The appeal, so far as it is directed to reverse the decision appealed from, should, I think, be dismissed, although the Crown has succeeded on the point as to the admissibility in evidence of the statement.

Lord Reading.—As to the second ground. A statement made in the presence of one of the parties to a civil action may be given in evidence against him if it is relevant to any of the matters in issue; and equally such a statement made in the

(*h*) (1834) 6 C. & P. 325. (*i*) (1854) 6 Cox C. C. 477.

presence of the accused may be given in evidence against him at his trial.

The principles of the law of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, and have acquired their force by the constant and invariable practice of Judges when presiding at criminal trials. They are rules of prudence and discretion, and have become so integral a part of the administration of the criminal law as almost to have acquired the full force of law. . . . Such a practice has also long existed in reference to the admissibility in evidence of such a statement as that now under consideration—see *Reg.* v. *Welsh* (*k*) and *R.* v. *Thompson* (*l*).

Such practice has found its place in the administration of the criminal law because Judges are aware from their experience that in order to ensure a fair trial for the accused, and to prevent the operation of indirect but not the less serious prejudice to his interests, it is desirable in certain circumstances to relax the strict application of the law of evidence. Nowadays, it is the constant practice for the Judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, although admissible in law, has little value in its direct bearing upon the case, and might indirectly operate seriously to the prejudice of the accused, should not be given against him; and speaking generally, counsel accepts the suggestion and does not press for the admission of the evidence unless he has good reason for it. . . .

In general, such evidence can have little or no value in its direct bearing on the case unless the accused, upon hearing the statement, by conduct and demeanour, or by the answer made by him, or in certain circumstances by the refraining from an answer, acknowledged the truth of the statement either in whole or in part, or did or said something from

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(*k*) (1862) 3 F. & F. 275.
(*l*) 79 L. J. K. B. 321; [1910] 1 K. B. 640.

which the jury could infer such an acknowledgment, for if he acknowledged its truth, he accepted it as his own statement of the facts. If the accused denied the truth of the statement when it was made, and there was nothing in his conduct and demeanour from which the jury, notwithstanding his denial, could infer that he acknowledged its truth in whole or in part, the practice of the Judges has been to exclude it altogether. In *R.* v. *Norton* (*m*), Mr. Justice Pickford, in delivering the judgment of the Court of Criminal Appeal, said, "If there be no such evidence [that is of acknowledgment by the accused], then the contents of the statement should be excluded; if there be such evidence, then they should be admitted." If it was intended to lay down rules of law to be applied whenever such a statement is tendered for admission, I think that the judgment goes too far; they are valuable rules for the guidance of those presiding at trials of criminal cases when considering how the discretion of the Court with regard to the admission of such evidence should be exercised, but it must not be assumed that the judgment in *R.* v. *Norton* exhausts all the circumstances which may have to be taken into consideration by the Court when exercising its judicial discretion.

It might well be that the prosecution wished to give evidence of such a statement in order to prove the conduct and demeanour of the accused when hearing the statement as a relevant fact in the particular case, notwithstanding that it did not amount either to an acknowledgment or some evidence of an acknowledgment of any part of the truth of the statement. I think it is impossible to lay down any general rule to be applied to all such cases, save the principle of strict law to which I have referred.

Upon the whole, therefore, I come to the conclusion that the rules formulated in *R.* v. *Norton*, and followed in this and other cases, must be restricted in their application as above indicated, and cannot be regarded as strict rules of law regulating the admissibility of such evidence.

(*m*) 79 L. J. K. B. 756; [1910] 2 K. B. 496.

I think, therefore, that this statement was in law admissible as evidence against Christie.

As to the fourth point. The statement under review formed no part of the incidents constituting the offence. It was not made whilst the offence was being committed or immediately thereafter. It took place after Christie had left the boy, and the mother had found him and taken him across the fields and had spoken to another man. In my view, it was not so immediately connected with the act of assault as to form part of the *res gestæ*. . . .

Assuming that your Lordships were of opinion that the boy's statement was admissible, this conviction, for other reasons, could not stand, and was properly quashed. By virtue of s. 30 of the Children Act, 1908 (8 Edw. 7. c. 67), Christie could not be convicted unless the boy's testimony was "corroborated by some other material evidence in support thereof implicating the accused." There was no sufficient direction and there was misdirection to the jury of the requisites of corroboration under this statute. Such direction as was given by the deputy chairman was erroneous, inasmuch as it treated the statement by the boy, given in evidence by the mother and the constable, as corroboration of the boy's evidence implicating the accused. That is manifestly wrong. It was for the deputy chairman to satisfy himself that there was evidence of corroboration fit to be submitted to the jury within the meaning of the statute, and then to direct them not to convict unless they accepted the evidence of corroboration. He did not give this direction, and therefore, notwithstanding the view which I have expressed about *R. v. Norton* and of the admissibility of the boy's statement in this case, I am of opinion that the conviction was rightly quashed, and that the appeal should be dismissed.

186.

R. v. BASKERVILLE.

(1917) 86 L. J. K. B. 28.

Corroboration. [The facts appear from the judgment.]

Judgment of the Court of Criminal Appeal, delivered by:

Viscount Reading, C.J.—The appellant was convicted of having committed offences under s. 11 of the Criminal Law Amendment Act, 1885, with two boys. He appeals to this Court on the ground that there was no such corroborative evidence as is required by law of the testimony of the boys, who were called for the prosecution at the trial, and were accomplices in the crime. There is no statutory provision requiring corroboration applicable to these offences.

At the close of the arguments we decided that there was abundant corroboration. In addition to the testimony of the accomplices, the following facts were given in evidence. A letter was proved to have been sent to one of the boys by the appellant in his handwriting, signed by him with his initial B., without any address on the letter, inclosing a 10s. note to "Dear Harry," one of the boys, for himself, and "Charlie," another of the boys, and making an appointment for them to meet the appellant "as arranged" without naming the place, and at a time stated. The prisoner had admitted to the police that the boys had been at his flat; that he knew one as a page boy at the Trocadéro Restaurant, and that this boy had been to see him on several occasions with another boy; and the appellant suggested to the police that he belonged to a boys' club, and therefore was entitled to invite any of the members to his place. The appellant was not a member of a boys' club. The appellant gave evidence at the trial, and admitted that he had given money to the boys on various occasions, and that on hearing a peculiar whistle outside his flat he had gone downstairs to let the boys in. We entertained no doubt that this evidence afforded ample corroboration of the boys' testimony, even if we assumed that the corroboration required was

corroboration "in some material particular implicating the accused." The learned Recorder directed the jury that they must not convict upon the testimony of the accomplices unless they were satisfied that there was "corroboration in some material particular affecting the accused." We were of opinion that in any event that direction gave no cause of complaint to the appellant. The warning by the Recorder to the jury was sufficient, if, indeed, not more than sufficient. We therefore intimated that the appeal would be dismissed.

Having regard, however, to the arguments addressed to the Court, and to the difficulty of reconciling all the opinions expressed in the cases cited, and to the general importance of reviewing and restating the law applicable to corroboration of the evidence of the accomplices, we took time to consider our judgment. **There is no doubt that the uncorroborated evidence of an accomplice is admissible in law—see** *R.* v. *Atwood* (*a*). **But it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the Judge, to advise them not to convict upon such evidence; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence—***Reg.* v. *Stubbs* (*b*) **and** *Meunier, In re* (*c*). **This rule of practice has become virtually equivalent to a rule of law; and since the Court of Criminal Appeal Act, 1907 (7 Edw. 7. c. 23), came into operation this Court has held that in the absence of such a warning by the Judge the conviction must be quashed—***R.* v. *Tate* (*d*). **If after the proper caution by the Judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated.** It can but rarely happen that the jury would convict in such circumstances. In considering whether or not the conviction should stand this Court will review all the facts of the case, and will bear in

(*a*) (1787), 1 Leach C. C. 464.
(*b*) 25 L. J. M. C. 16; Dear. C. C. 555.
(*c*) 63 L. J. M. C. 198; [1894] 2 Q. B. 415.
(*d*) 77 L. J. K. B. 1043; [1908] 2 K. B. 680.

mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this Court, in the exercise of its powers, will quash a conviction even when the Judge has given to the jury the warning or advice above-mentioned if this Court, after considering all the circumstances of the case, thinks the verdict unreasonable or that it cannot be supported, having regard to the evidence—Court of Criminal Appeal Act, 1907, s. 4 (1). This jurisdiction gives larger powers to interfere with verdicts than had heretofore existed in criminal cases.

In addition to the rule of practice above-mentioned there are, with regard to certain offences, statutory provisions that no person shall be convicted upon the evidence of one witness unless such witness shall be corroborated in some material particular implicating the accused—for example, the Criminal Law Amendment Act, 1885, ss. 2 and 3. In these cases the law is that the Judge, in the absence of such corroborative evidence, must stop the case at the close of the prosecution and direct the jury to acquit the accused. Where no such statutory provision is applicable to the offence charged, and the evidence for the prosecution consists of the uncorroborated testimony of an accomplice or accomplices, the law is that the Judge should leave the case to the jury after giving them the caution already mentioned.

As the rule of practice at common law was founded originally upon the exercise of the discretion of the Judge at the trial, and, moreover, as it is anomalous in its nature, inasmuch as it requires confirmation of the testimony of a competent witness, it is not surprising that this rule should have led to differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. For example, "confirmation does not mean that there should be independent evidence of that which the accomplice relates or his testimony would be unnecessary"—*Reg.* v. *Mullins* (*e*). Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence

(*e*) 3 Cox C. C. 526, *per* Mr. Justice Maule, at p. 531.

would not be essential to the case; it would be merely confirmatory of other and independent testimony. Again, the corroboration must be by some evidence other than that of an accomplice, and therefore one accomplice's evidence is not corroborative of the testimony of another accomplice—*R.* v. *Noakes* (*f*). The difference of opinion has arisen in the main in reference to the question whether the corroborative evidence must connect the accused with the crime. The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true, and that it is reasonably safe to act upon it. If the only independent evidence relates to an incident in the commission of the crime which does not connect the accused with it, or if the only independent evidence relates to the identity of the accused without connecting him with the crime, is it corroborative evidence?

There are some expressions to be found in the books which imply that it may be; and in *Rex* v. *Birkett* (*g*) the judges were of opinion that an accomplice did not require confirmation as to the person he charged if he was confirmed as to the particulars of his story. The case is very imperfectly reported and the evidence is not stated. It was not argued by counsel, but was stated verbally to a meeting of the Judges by the Judge who tried the case. There are other cases where it has been held that a conviction on such evidence could not be quashed by the Court; but the *ratio decidendi* is that as an accomplice is a competent witness, and the jury thought him worthy of credit, the verdict was in accordance with the law—*R.* v. *Atwood* (*h*) and *R.* v. *Jones* (*i*). There are other cases where it has been held that on such evidence the case cannot be withdrawn from the jury—*R.* v. *Hastings* (*k*), *Reg.* v. *Andrews* (*l*), and *Reg.* v. *Avery* (*m*). After examining these

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(*f*) (1832), 5 Car. & P. 326.
(*g*) (1813), Russ. & R. 251.
(*h*) 1 Leach C. C. 464.
(*i*) (1809), 2 Campb. 131.
(*k*) (1835), 7 Car. & P. 152.
(*l*) 1 Cox C. C. 183, *per* Mr. Justice Coleridge.
(*m*) (1845), 1 Cox C. C. 206.

and other authorities to the present date, we have come to the conclusion that the better opinion of the law upon this point is that stated in *Reg.* v. *Stubbs* (*n*) by Baron Parke—namely, that **the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner.** The learned Baron does not mean that there must be confirmation of all the circumstances of the crime; as we have already stated, that is unnecessary.

It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime. Baron Parke gave his opinion as the result of twenty-five years' practice; it was accepted by the other Judges, and has been much relied upon in later cases. In *R.* v. *Wilkes* (*o*) Baron Alderson said: "The confirmation which I always advise juries to require, is a confimation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence." In *Reg.* v. *Farler* (*p*) Lord Chief Baron Abinger said: "It is a practice which deserves all the reverence of law, that Judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. . . . It would not at all tend to show that the party accused participated in it." In *Reg.* v. *Dyke* (*q*) Baron Gurney said: "Although,

(*n*) 25 L. J. M. C. 16; Dear. C. C. 155.
(*o*) (1836), 7 Car. & P. 272.
(*p*) 8 Car. & P. 106.
(*q*) 8 Car. & P. 261.

in some instances, it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the transaction." In *Reg.* v. *Birkett* (*r*), the prisoner was indicted for receiving stolen sheep. The evidence consisted of the statement of an accomplice; and to confirm it, it was proved that a quantity of mutton corresponding in size with the sheep stolen was found in the prisoner's house. Mr. Justice Patteson said: "If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient . . . but here we have a great deal more; we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the accomplice's evidence as I must leave to the jury."

These cases lead to the view expressed later by Baron Parke in *Reg.* v. *Stubbs* (*s*), and show that in his time, although there had been doubt in the past, the law as formulated by him was accepted as the correct opinion, and continued to be the law to the time of the passing of the Criminal Appeal Act, 1907, and in our judgment to the present day.

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him—that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same, whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute. The language of the statute, "implicates the accused," compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high

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(*r*) (1839), 8 Car. & P. 732.
(*s*) 25 L. J. M. C. 16; Dear. C. C. 555.

degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

The corroboration need not be direct evidence that the accused committed the crime: it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *Reg.* v. *Birkett* (*t*). Were the law otherwise, many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice.

The decisions of this Court upon the nature of the corroboration required call for some explanation, and it is because they do not always appear to be to the same effect that this Court was specially constituted in order that we might lay down rules for future guidance.

In *R.* v. *Everest* (*u*) the Court said: "The rule has long been established that the Judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused." We think "tell the jury to acquit" should read "warn the jury of the danger of convicting." There is no statement in the report of the exact warning given by the Judge. In *R.* v. *Wilson* (*x*) there was an abundant caution, and the Court said: "It must not be supposed that corroboration is required amounting to independent evidence implicating the accused." If this means that the Judge should not warn the jury to require independent corroboration of some part of the story which implicates or involves the accused, it goes too far.

In *R.* v. *Blatherwick* (*y*) the Court said: "*R.* v. *Everest* (*z*) goes too far; *R.* v. *Wilson* (*a*) is the correct statement of the

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(*t*) 8 Car. & P. 732.
(*x*) 6 Cr. App. R. 125.
(*z*) 2 Cr. App. R. 130.
(*u*) 2 Cr. App. R. 130.
(*y*) 6 Cr. App. R. 281.
(*a*) 6 Cr. App. R. 125.

law." We agree that *R.* v. *Everest* (*b*) goes too far in saying that the Judge should direct the jury to acquit, but *R.* v. *Everest* (*c*) is the better statement of the law as regards the corroboration for which the jury should look.

In *Bradshaw* v. *Waterlow & Sons, Lim.* (*d*), Lord Justice Pickford in the Court of Appeal was of opinion that *Wilson's Case* (*e*) and *Blatherwick's Case* (*f*) " show that it is not necessary to have corroboration directly implicating the accused, if the corroboration which exists supports the truth of the story as a whole; . . ." The learned Lord Justice was merely stating his view of those cases in regard to the case then before the Court. He found, however, that in fact there was corroboration directly implicating the accused in the case then under appeal, and it was therefore unnecessary to consider further the cases of *R.* v. *Everest* (*g*), *R.* v. *Wilson* (*h*), and *R.* v. *Blatherwick* (*i*).

In *R.* v. *Cohen* (*k*) the Court did not attempt to deal with the difference of opinion manifested by the decisions of *R.* v. *Everest* (*l*) and *R.* v. *Wilson* (*m*) but, as explained in *R.* v. *Willis* (*n*), decided the case on the assumption that the more favourable view of the law to the appellant as laid down in *Everest's Case* (*o*) was right. The Court there said that it was the practice of this Court to require corroboration before it could allow a conviction to stand. We did not intend to lay down such a rule of practice. It is too strongly expressed, and is too general a statement. The correct view is that laid down earlier in the present judgment. The latest case is *R.* v. *Willis* (*p*). The Court there stated that " There are certain

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(*b*) 2 Cr. App. R. 130.
(*c*) 2 Cr. App. R. 130.
(*d*) [1915] 85 L. J. K. B. 318, 322; [1915] 3 K. B. 527, 534.
(*e*) 6 Cr. App. R. 125.
(*f*) 6 Cr. App. R. 281.
(*g*) 2 Cr. App. R. 130.
(*h*) 6 Cr. App. R. 125.
(*i*) 6 Cr. App. R. 281.
(*k*) 24 Cox C. C. 216; 10 Cr. App. R. 91.
(*l*) 2 Cr. App. R. 130.
(*m*) 6 Cr. App. R. 125.
(*n*) 85 L. J. K. B. 1129; [1916] 1 K. B. 933.
(*o*) 2 Cr. App. R. 130.
(*p*) 85 L. J. K. B. 1129; [1916] 1 K. B. 933.

statutes which provide that certain classes of evidence shall be insufficient to support a conviction unless corroborated by some other material evidence implicating the accused; but corroboration where required by the common law is not subject to any such qualification." It follows from the law laid down in the present judgment that that is a correct view to the effect that the verdict of a jury properly warned would not be set aside merely because they had believed an accomplice without corroboration implicating the accused; but it must not be read as meaning that the corroboration need not be independent evidence implicating the accused. The case of *R.* v. *Cooper* (*q*) was referred to during the course of the argument. That case turned upon special facts relating to the medical testimony. It did not alter the law. Now that we have stated the law to be applied in future cases we trust that it will be unnecessary again to refer to the earlier decisions of this Court.

The question was discussed on the hearing of this appeal whether the evidence of an accomplice against two prisoners corroborated as to one prisoner's participation in the crime, but not as to the other, can be regarded as corroboration with regard to both prisoners. We think the law is correctly stated by Baron Alderson in *R.* v. *Jenkins* (*r*). The learned Baron said: **"Where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one, is no confirmation of his testimony as to the other. If, therefore, you find there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both, it seems to me it would be unjust to give it a general effect."** The case of *R.* v. *Jones* (*s*) may appear at first sight to be in the contrary direction, but upon closer examination we do not think that Lord Ellenborough intended to decide more than that, when two prisoners are tried and convicted upon the evidence of an accomplice, corroborated as to the one, but not as to the other, the conviction of the other must nevertheless be regarded as a conviction which was good in law. Lord Ellenborough was upholding the rule of law that conviction founded upon the

(*q*) 10 Cr. App. 195. (*r*) 1 Cox C. C. 177. (*s*) 2 Campb. 131.

evidence of an accomplice only could not be treated as bad in law. His Lordship said: "Judges in their discretion will advise a jury not to believe an accomplice, unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed, that he is a competent witness; and the consequence is inevitable, that if credit is given to his evidence, it requires no confirmation from another witness."

We see no reason in principle why a different rule as to corroboration should apply to a prisoner tried with another, against whom there is corroborative evidence of the accomplice's story, from that applicable if the first prisoner had been tried alone. In that case the uncorroborated evidence of the accomplice would be admissible against him, but it would be the Judge's duty to give the proper caution to the jury; and it would be equally incumbent upon the Judge to give the warning when the prisoner is tried with another against whom there was corroboration of the accomplice's story. If the Judge failed to give the warning, this Court would be bound to set aside the conviction. If the Judge gave the warning, this Court would then have to consider all the circumstances of the case as already indicated.

187.

R. v. REDD.

[1923] 1 K. B. 104.

The appellant, who was undefended, was charged with breaking and entering a dwelling-house. He called a witness who voluntarily made a statement as to the good character of the appellant. He also gave evidence on his own behalf, but did not give any evidence of his own character. *Held*, that neither the witness nor the appellant ought to have been cross-examined as to the bad character of the appellant.

Judgment of the Court of Criminal Appeal, delivered by: Avory, J.—The question we have to determine is whether

the suggestion of the previous bad character of the appellant was properly put before the jury. So far as the evidence given by the witness Williams is concerned the Criminal Evidence Act, 1898, has no application, but it does fall within the authority of *Reg.* v. *Gadbury* (*a*). In the opinion of the Court the rule in that case is correctly stated in Archbold's "Criminal Pleading" (26th ed.), p. 366, as follows: "If the prisoner endeavours to establish a good character, either by calling witnesses himself, or by cross-examining the witness for the prosecution, the prosecution is at liberty, in most cases, to give proof of the prisoner's previous convictions." The question is whether the appellant was within the meaning of that rule endeavouring to establish a good character. In the opinion of the Court he was not endeavouring to establish a good character merely because a witness whom he called, voluntarily and probably against the appellant's own desire, made a statement as to the appellant's good character, and therefore the questions put to that witness in cross-examination by counsel for the prosecution were not admissible.

The matter does not stop there, because the appellant gave evidence on his own behalf, and he was cross-examined by counsel for the prosecution as to the number of times he had deserted from the Army, and he gave an answer which would convey to the jury that there was some truth in the question. The question put to the appellant in cross-examination as to his desertion from the Army does come directly within the provisions of the Criminal Evidence Act, 1898. That Act provides in s. 1 (f) that, "a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character. . . ."

(*a*) 8 C. & P. 676.

In the opinion of the Court the appellant had not given evidence of good character within the meaning of the Act and therefore the cross-examination as to the appellant's desertion from the Army was not admissible.

188.

R. v. WILLIAM JONES.

[1923] 17 Cr. App. R. 117.

It is an imputation on the character of a witness to say that he has fabricated evidence and has obtained successive remands for that purpose. [The facts appear from the judgment.]

Judgment of the Court of Criminal Appeal, delivered by:

Lord Hewart, C.J.—This appellant appeals against conviction upon the ground that the learned Recorder wrongly allowed him to be cross-examined upon his previous convictions. It is not seriously contested that there was ample evidence on which the jury might have convicted. The matter arose in this way. Evidence was given by an inspector that he saw appellant in custody, and that appellant said, "I got in there, the stuff went out of Liverpool the same night by motor." Various questions having been put to appellant by his counsel, he was asked how many times he was in Court before, and he replied to the effect that he was brought up on remand after remand, and that as the police had no evidence, the statement alleged by the inspector had been invented. The learned Recorder asked what was meant, and counsel informed him that he was instructed by his client that he was brought up on remand four times. The learned Recorder then asked, "Is it your case that the police obtained four remands in order to manufacture evidence?" and counsel admitted that those were his instructions. The whole question turns on s. 1 (f) of the Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36. That section says, "a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to

show that he has committed, or been convicted of, or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless," and (ii) "he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

Attention has been directed to the cases of *Rouse*, *Preston*, *Sheean and Bridgwater*. What emerges from an examination of those cases is that it is often difficult to say on which side of the line a case falls. The present case is one of that kind. The matter was considered in the case of *Preston*, where Channell, J., said (*a*): **"If the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner about his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely upon his evidence. That is the general nature of the enactment and the general principle underlying it."**

A clear line is drawn between words which are an emphatic denial of the evidence and words which attack the conduct or character of the witness (*b*). Applying that *ratio decidendi* to the present case, it appears to this Court that it comes within the line of saying what is forbidden. It was one thing for appellant to deny that he had made the confession; but it is another thing to say that the whole thing was a deliberate and elaborate concoction on the part of the

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(*a*) [1909] 1 K. B. at p. 58.
(*b*) See note at end of this case.

inspector; that seems to be an attack on the character of the witness.

Note.—The first case upon this point is *R.* v. *Marshall* (1899) 63 J. P. 36, where Darling, J., ruled that in a case of murder, where a prisoner, giving evidence, alleged that the deceased had been killed by her husband, who was a witness for the prosecution, she might be cross-examined as to previous convictions. This ruling was followed on many occasions. In *R.* v. *Rouse* [1904] 1 K. B. 184; 73 L. J. K. B. 104, the prisoner was asked in cross-examination: "Did you ask the prosecutor to sell you the mare . . . or has he invented all that?" To which he replied: "No, it is a lie and he is a liar." *Held*, by the Court for Crown Cases Reserved, that this answer was not sufficient to allow cross-examination of the prisoner as to his character, for the prisoner "did no more than he had a right to do, in the emphatic way of a man of a class—namely, deny the truth of the suggestion put to him." In *R.* v. *Bridgwater* [1905] 1 K. B. 131; 74 L. J. K. B. 35, counsel for the prisoner cross-examined a detective-sergeant, named Moss, suggesting that the prisoner, who was convicted for stealing copper, had acted under the directions of Moss. *Held*, by the Court for Crown Cases Reserved, that this cross-examination would not render the prisoner liable to be cross-examined as to previous convictions. Lord Alverstone, C.J., said: "I must repeat what I have said before, namely, that raising a defence, even in forcible language, is not of necessity casting imputations on the character of the prosecutor or his witnesses. No doubt imputations may be cast on their character quite independently of the defence raised, either by direct evidence, or by questions put to them in cross-examination. . . . It seems to me . . . the prisoner's counsel by his questions to Moss was not doing more than developing his defence that the prisoner believed that he was acting under Moss's directions and seeking to substantiate that defence by means of admissions from Moss. If the questions put to Moss had involved the imputation that he was guilty of misconduct independently of the defence, or of the necessity for developing the defence, different considerations might arise, for the question might then perhaps be construed as an attack on the prosecutor's general character." The last two cases were followed in *R.* v. *Preston* [1909] 1 K. B. 568; 78 L. J. K. B. 335, and *R.* v. *Westfall* (1912) 28 T. L. R. 297.

In *R.* v. *Sheean* (1908) 24 T. L. R. 459, a prisoner, who was charged with rape, stated in evidence that the prosecutrix was a consenting party, but it was *held* by Jelf, J., that this, being a defence to the charge, did not warrant cross-examination of the prisoner as to his previous convictions. In *R.* v. *Preston* this case was left open for future consideration. In *R.* v. *Hudson* [1915] 1 K. B. 838; 81 L. J. K. B. 861, the prisoner's counsel cross-examined witnesses for the prosecution to show that it was they who had committed the offence with which the prisoner was charged. *Held*, by the Court of Criminal Appeal, that the prisoner could be cross-examined as to a previous conviction. Lord Alverstone, C.J., in delivering the judgment of the Court, reviewed all the foregoing cases (except that of *R.* v. *Sheean*), and said: "The decision in these

three cases (*Bridgwater, Preston* and *Westfall*) may well be supported on grounds which do not touch the question raised in the present case. They cannot be treated as laying down a general rule applicable to all cases, and in the opinion of the Court they are not a complete enunciation of the law under the section. The Court certainly had no intention, in giving judgment in *Rex* v. *Preston*, of overruling *Rex* v. *Marshall*, which was cited before them in the course of the argument. In our opinion, where a prisoner—certainly when defended by counsel—has through that counsel accused the witnesses of having committed the crime with which he, the prisoner, is charged, the case comes directly within the section, and the prisoner can be cross-examined as to his character or previous convictions.

"We think that the words of the section, 'unless . . . the nature or conduct of the defence is such as to involve imputations,' &c. must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily' or 'unjustifiably' or 'for purposes other than that of developing the defence,' or other similar words."

189.

R. v. HARRIS.

(1922) 91 L. J. K. B. 587.

Habitual criminals—Procedure before, during, and after trial.

Judgment of the Court of Criminal Appeal, delivered by:

Lord Trevethin, C.J.—As in some of these cases there have been errors in practice and procedure which necessitate quashing the convictions, the Court thinks it advisable to re-state the law on these points and then to deal with each case individually. It will be observed that by the Prevention of Crime Act, 1908, a person can only be convicted of being a habitual criminal where, after having been convicted on indictment of a crime, the offender admits that he is, or is found by the jury to be, a habitual criminal and the Court passes a sentence of penal servitude in respect of the crime for which he has been so convicted [s. 10 (1)]. As far as the verdict of the jury is concerned a person cannot be found to be a habitual criminal until after proper procedure the jury find either:—(a) That since the age of sixteen years he has at least three

times previously to the commission of the crime charged in the indictment, been convicted of a crime and that he is leading persistently a dishonest or criminal life, or (b) That he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention [s. 10 (2)]. The provisions of the Act as to practice and procedure are peculiar, and a due appreciation of and a strict compliance with them are necessary. Most of the points relating thereto will be found decided in *R.* v. *Turner*, but we now proceed to deal with those arising in the cases before us as to proceedings (1) Before trial; (2) During trial; (3) After conviction.

As to (1) **Proceedings before trial.** There are two conditions precedent: (a) The consent of the Director of Public Prosecutions has to be given; (b) seven days' notice has to be given to the proper officer of the Court by which the offender is to be tried, and to the offender himself, that it is intended to insert such charge, and the notice to the offender must specify the previous convictions and the other grounds upon which it is intended to found the charge. These two conditions are of the utmost importance, and unless proper notice has been given no valid trial can take place. The notice itself should give with particularity not only the convictions, but the other grounds upon it is intended to found the charge. The latter must refer specifically to the facts, but not the evidence upon which the prosecution intend to rely for proof that the offender is leading persistently a dishonest or criminal life. It is not sufficient to state these facts generally; they must be set out in detail. The Court has repeatedly laid down these principles and of the many reported cases three may be cited as examples:—*R.* v. *Marshall* (*a*), *R.* v. *Neilson* (*b*), *R.* v. *Russell* (*c*).

With regard to (2) **Proceedings during trial.** The indictment should be framed to show clearly that the person is charged with being a habitual criminal (see rule 11 of the First Schedule to the Indictments Act, 1915) (*d*) and after

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(*a*) 8 Cr. App. R. 20.
(*b*) 109 L. T. 912.
(*c*) 12 Cr. App. R. 271.
(*d*) Indictments Act, 1915, First Schedule, rule 11: "Any charge of a previous conviction of an offence or of being a habitual criminal . . .

verdict, but before sentence at the trial on the primary offence, the charge of being a habitual criminal should be clearly put to the prisoner for him to plead to—*R.* v. *Walker* (*e*). Care should be taken during the trial that evidence is not given against the offender unless due notice of the facts has been already given to him. Counsel for the prosecution should especially be careful to observe the grounds alleged in the notice of the Director of Public Prosecutions and to see that his witnesses do not run on and give evidence of facts not set out in such notice. A general question to a police officer: "What do you know about the prisoner?" may let in evidence of facts not so set out and lead to the quashing of the conviction. For example, it is not permissible to prove any conviction unless it has been set out in the notice given before trial; nor again is it permissible to prove conduct which has not formed the subject of a conviction, for example, conduct of a dishonest character, unless the facts relating thereto have been set out in such notice. If it is intended to prove that the offender has been associating with thieves, that fact must have been set out in the notice:—*R.* v. *Turner* (*f*); *R.* v. *Summers* (*g*); *R.* v. *Maxfield* (*h*); *R.* v. *Stockdale* (*i*). Unless these facts have been included therein, proof cannot be given, although by sub-s. 5 of s. 10, the ordinary rule of evidence is relaxed and evidence of character and repute may, if the Court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life. Upon this question of a man's leading persistently a dishonest or criminal life, where there has been a considerable lapse of time between a man's last conviction and the commission of the offence which forms the subject of the primary indictment at the

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shall be charged at the end of the indictment by means of a statement—in the case of a previous conviction that the person accused has been previously convicted of that offence at a certain time and place without stating the particulars of the offence, and in the case of a habitual criminal . . . that the offender is a habitual criminal. . . . "

(*e*) 27 T. L. R. 51.
(*f*) [1910] 1 K. B. 346; 79 L. J. K. B. 176.
(*g*) 10 Cr. App. R. 11.
(*h*) 28 T. L. R. 404.
(*i*) 11 Cr. App. R. 108.

trial, notice containing particulars must have been given and proved of the facts upon which the prosecution rely for saying that the offender is leading such a life. If, on the other hand, the time between a man's discharge from prison and the commission of the next offence is a very short one, it may be open to the jury to find that he is leading persistently a dishonest or criminal life by reason of the mere fact that he has again committed an offence so soon after his discharge from a previous one, provided the notice has stated this as a ground. This is a question of fact (see *R.* v. *Condon* (*k*) and *R.* v. *Heard* (*l*)). In our view any attempt by a man to lead an honest life after his discharge should be put clearly and emphatically before the jury—*R.* v. *Mitchell* (*m*), *R.* v. *Crowley* (or *Sullivan*) (*n*), and *R.* v. *Hammersley* (*o*); and care should be taken when the evidence is given of the man's repute during such period to see that such evidence is of a character that is properly admissible and fairly left to the jury—*R.* v. *Young* (*p*).

As to (3) **Proceedings after conviction,** it should be observed that there is no obligation on the Court to pass a sentence of preventive detention. Unless the Court passed a sentence of penal servitude for the primary offence, it has no jurisdiction to pass a sentence of preventive detention and even if the Court does pass such a sentence of penal servitude there is no obligation to pass a sentence of preventive detention in respect of the man having been found a habitual criminal. That is a matter for the consideration of the Court —*R.* v. *Stanley* (*q*).

(*k*) 4 Cr. App. R. 109.
(*l*) 106 L. T. 304.
(*m*) 108 L. T. 224.
(*n*) 83 L. J. K. B. 298; 110 L. T. 127.
(*o*) 14 Cr. App. 118; 122 L. T. 383.
(*p*) 109 L. T. 753.
(*q*) [1920] 2 K. B. 235; 89 L. J. K. B. 452

199.

R. v. NORMAN.

[1924] 18 Cr. App. R. 81.

Habitual Criminal. [The questions of law appear from the judgment.]

The Lord Chief Justice read the following judgment: I am asked to say that Horridge, Lush, McCardie, Roche, Greer, Swift and Branson, JJ., concur in the judgment which I am about to deliver.

This appellant pleaded guilty at the Central Criminal Court to counts in an indictment charging him with burglary, stealing and receiving, and uttering a forged cheque. He was also found to be a habitual criminal. In the result he was sentenced to three years' penal servitude and five years' preventive detention. The statutory notice given by the Director of Public Prosecutions was based primarily, but not exclusively, on the proposition set out in s. 10 (2) (b) of the Prevention of Crime Act, 1908, and stated that on September 6th, 1917, the appellant was found by a jury to be a habitual criminal, and was then sentenced to six years' preventive detention. The statutory notice added that evidence might also be given of a long series of previous convictions against the appellant. At the trial, upon proof, set out in the notice, being given that the appellant had already been found to be, and had been sentenced as, a habitual criminal, he was informed by the Court that evidence upon his part was "of no avail," and the jury was directed that it was compelled to find that he then was a habitual criminal. The appellant appeals against that finding.

It is said on the part of the prosecution that in a case where the notice served on the prisoner contains the statement set out in s. 10 (2) (b) of the statute, the only question is one of identity—namely, is this prisoner the same person as the one who was previously found to be a habitual criminal and sentenced to preventive detention? If that question is answered affirmatively, it is contended that the jury has no choice in the matter, that its verdict becomes purely auto-

matic, that no other question arises, and no other evidence is admissible, and that the jury is bound to find as a fact that the prisoner still is, at the time when the verdict is given, a habitual criminal.

This result, it is said, follows from the judgments given in three decided cases. Those cases are *Collins*, which is not reported: *Davis*, [1917] 2 K. B. 855; and *Stanley*, [1920] 2 K. B. 235. But an examination of those cases seems to show that the proposition is not accurate. . . .

The question is, therefore, what does the statute mean? Now it is to be observed that by s. 10 (1) the provisions concerning detention of habitual criminals apply only in cases where, after conviction for a crime, " the offender admits that he is, or is found by the jury to be, a habitual criminal." That is to say, **unless the offender makes the admission, it is in each case a question, not of law for the judge, but of fact for the jury, whether the offender is a habitual criminal.** Then sub-s. (2) of s. 10 enacts that " a person shall not be found to be a habitual criminal unless the jury finds on evidence " one or other of two things (a) or (b). Here, again, the statute seems deliberately to make it plain that the question is one of fact for the jury, to be determined by the jury on evidence. Sub-s. (1) has already enacted that, in the absence of an admission on the part of the offender, it is for the jury to find whether he is a habitual criminal. It follows that when sub-s. (2) provides that " a person shall not be found to be a habitual criminal unless " one must read in the words " by the jury " after the word " found," so that the opening words of sub-s. (2) when they are written out in full, read in this way:—" a person shall not be found by the jury to be a habitual criminal unless the jury find on evidence "—(a) or (b). The question for the jury seems always to be the general question, Is this offender a habitual criminal? and the jury must not answer that question in a sense adverse to the offender unless, at least, it is satisfied of the truth of one or other of the two propositions (a) or (b). In other words, the affirmative answer of the jury to the general question must at the least be founded upon, and involve, an affirmative answer

to the particular question. This view of the matter seems to be strengthened by the remaining provisions of the section. It is, for example, provided by sub-s. (3) that in any indictment under the section "it shall be sufficient to state that the offender is a habitual criminal," that is to say, the general proposition, and in sub-s. (4) the question for the jury appears to be expressly defined and set out in these exact words, "the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal," that is to say, the general question. . . . More than that, by sub-s. (5) of the same section it is expressly provided that "without prejudice to any right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the Court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life." In these words there is nothing to say or to suggest that where the statutory notice is directed primarily or exclusively to proposition (b) in sub-s. (2), the accused is debarred from giving or tendering evidence on his own behalf. The words of sub-s. (5) seem clearly to point to the opposite conclusion. . . .

It is further contended that it must be right to direct the jury that it has no choice in the matter where the statutory notice contains proposition (b) because (it is argued) it must be right to direct the jury that it has no choice in the matter where the notice contains proposition (a) of s. 10 (2), and the evidence is such as to establish the proposition. But this argument appears to rest upon no sufficient foundation. The requirements of proposition (a) are satisfied in full as soon as it is proved, for example, that the defendant was three times convicted after the specified age, and that he is leading persistently a dishonest life. The words are "dishonest *or* criminal," not "dishonest *and* criminal," and the words are "*is* leading persistently" not "has since the last of such convictions been leading persistently." Yet it might well be that a jury should, and would decline to find the defendant to be a habitual criminal if he succeeded in establishing, for example, that for many

years after the last of the three convictions he had lived an honest life, or that the convictions, or some of them, were for comparatively minor offences, or that they or some of them were separated by such an interval of time as not to point to a habit. Certainly it has not yet been suggested that evidence to that effect would be irrelevant, though in the present case the defendant was informed, and, if the argument for the Crown be correct, was rightly informed, that it would be a mere waste of time for him to offer to the jury evidence relating to his mode of life after his release from preventive detention. Where the statutory notice is given with special reference to proposition (a) in s. 10 (2), and the evidence proves the proposition, nevertheless the offender may rightly be found not to be a habitual criminal. To take an illustration, a man of fifty years of age may be found to have been three times convicted of crime between the ages of sixteen and twenty-five years, and the evidence may prove that he is leading persistently a dishonest life by persistently pretending to be in holy orders, or to be a qualified medical man. Yet the jury might say, and say properly, that he was not the sort of person the Act was aimed at, and that he ought not because he had committed some fresh offence to be found to be a habitual criminal. . . .

In our opinion, therefore, a direction was in the present case given to the jury which was too unfavourable to the appellant, and he was prevented from giving evidence on his own behalf. But it might, nevertheless, be contended that no substantial miscarriage of justice has actually occurred, and that the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, ought to be applied. . . . There is, it is clear, much to be said for that contention. Upon the whole, however, in view of all the circumstances, we do not think it necessary or desirable to apply the proviso to the facts of the present case. In the result, therefore, the appeal is allowed, and the sentence of preventive detention is quashed.

A dissenting judgment, in which Rowlatt, Bailhache and Shearman, JJ., concurred, was read by Avory, J. This is the first dissenting judgment under s. 1 (5) of the Criminal Appeal Act in the history of the Court.

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